TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 744

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WRIGHTWOOD DAIRY COMPANY

No. 783

WRIGHTWOOD DAIRY COMPANY, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitions for certiorari filed November 14, 1941, December 4, 1941.
Certiorari granted December 8, 1941.

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

7619 *vs.*

WRIGHTWOOD DAIRY COMPANY,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

7620 *vs.*

WRIGHTWOOD DAIRY COMPANY,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

D. J. 475 - The Gunthorp-Warren Printing Company, Chicago—5-6-41—90

INDEX.

	PAGE
Placita	1
Complaint, filed Dec. 26, 1939	2
Exhibit "A"—Order No. 41, Regulating the Handling of Milk in Chicago Marketing Area	8
Notice of motion for Preliminary Injunction, filed Jan. 17, 1940	23
Motion for Preliminary Injunction	24
Affidavit of Nikitas J. Cladakis	24
Affidavit of Otie M. Reed	28
Consolidated Motions to Complaint, etc., filed Jan. 17, 1940	41
Affidavit of Joseph Sawa, filed Jan. 29, 1940	43
Article from "Pure Milk"	47
Order on Defendant's Motion, entered Feb. 2, 1940	60
Plaintiff's more definite statement of Claim, filed Feb. 16, 1940	61
Tentatively Approved Marketing Agreement	63
Exhibit 6—Letter Aug. 19, 1939, Connor to Milk Producers	78
Exhibit 5—Milk Producers' Ballot	79
Exhibit 7—Statement "Some Highlights on the Milk Marketing Agreement Program for the Chicago Area	80
Exhibit 8—Milk Producers' Association Ballot	83
Answer and Counterclaim, filed Apr. 3, 1940	84
Motion to Dismiss Counterclaim, filed June 4, 1940	101
Notice of Motion to file Amendment to Answer, filed June 25, 1940	102
Order granting leave to file Amendment to answer instanter, entered June 25, 1940	103
Amendment to Answer, filed June 25, 1940	104

Motion for Summary Judgment, filed July 19, 1940... 105
Affidavit of Herbert H. Erdmann..... 112
Affidavit of William B. Connor..... 114
Notice of motion to file Supplemental Answer instanter, filed Sept. 9, 1940..... 116
Order granting leave to file Supplemental Answer instanter, entered Sept. 9, 1940..... 117
Supplemental Answer, filed Sept. 9, 1940..... 118
Exhibit "A"—Order of Secretary of Agriculture, dated June 21, 1940..... 120
Affidavit of Joseph Sawa in opposition to motion for Summary Judgment, filed Sept. 16, 1940..... 142
Supplemental motion for Summary Judgment, filed Sept. 16, 1940..... 144
Motion to strike affidavits of Connor, Erdmann, Cladakis and Reed, filed Sept. 17, 1940..... 145
Order continuing motions to Strike, Etc., to Sept. 27, 1940, entered Sept. 17, 1940..... 154
Affidavit of Ernest Allen, filed Sept. 17, 1940..... 155
Motion to Strike certain Defenses, filed Oct. 4, 1940.. 156
Order denying motion for Summary Judgment, etc., entered Oct. 4, 1940..... 157

REPORT OF PROCEEDINGS.

Colloquy 159, 184, 188, 192, 194, 220, 222, 225, 242
Statement by Mrs. Myers..... 160
Statement by Mr. Stein..... 163

Plaintiff's Witnesses.

Testimony of:
Connor, William B. 224
Krueger, Paul F. 218

DEFENDANT'S EXHIBITS.

A—Report No. 1011—Amend the Agricultural Adjustment Act, and for other purposes 203
B—Report No. 1241—Agricultural Adjustment Act Amendments 211
C—Report No. 808—Agricultural Adjustment Act Amendments 212
D—Congressional Record—Volume 79, Pages 11135 and 11136—Agricultural Adjustment Act Amendments 214
Nos. 6 and 7—List of Dealers to whom notices of referendum were sent 231
Order as to certain motions, etc., entered Oct. 29, 1940 244
Findings of Fact, filed Oct. 31, 1940 245
Conclusions of Law 246
Judgment, entered Oct. 31, 1940 247
Motion for New Trial, filed Nov. 28, 1940 248
Order denying motion for new trial, entered Dec. 9, 1940 249
Notice of Appeal, filed Dec. 13, 1940 250
Statement of Points 250
Designation of Record 253
Notice of Cross Appeal, filed Jan. 24, 1941 256
Amendment to Notice of Appeal, filed Jan. 31, 1941 ... 257
Additional Designation of Record 258
Defendant's Statement of Points 259
Stipulation as to Original Exhibits 261
Order as to Original Exhibits 263
Motion as to Transcript of Evidence 264
Orders extending time to file Transcript 266
Clerk's Certificate 268

Proceedings in U. S. C. C. A., Seventh Circuit 269
Clerk's certificate to record 269
Opinion, Kerner, J. 270
Judgment—Case No. 7619 275
Judgment—Case No. 7620 275
Clerk's certificate 275
Orders allowing certiorari 277

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Charles E. Woodward, District Judge of the United States for the Northern District of Illinois on the 29th and 31st day of October, in the year of our Lord one thousand nine hundred and forty, each being days of the regular October Term of said Court, begun Monday, the Seventh day of October, and of our Independence the 165th year. Placita.

Present:

Honorable Charles E. Woodward, District Judge,
William H. McDonnell, U. S. Marshal,
Hoyt King, Clerk

Filed Dec. 26, 1939. 2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America
vs.
Wrightwood Dairy Company. } Civil Action No. 1211.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the twenty-sixth day of December, A. D. 1939:

3 (Caption)

COMPLAINT.

Plaintiff, by William J. Campbell, United States Attorney in and for the Northern District of Illinois, Eastern Division, acting under the direction of the Attorney General, upon request of the Secretary of Agriculture of the United States, brings this complaint and alleges:

I.

The defendant, Wrightwood Dairy Company, is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business at 2942 North Ashland Avenue in the City of Chicago in said State.

II.

This proceeding is brought under Section 8a(6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a(6), as amended May 9, 1934 (48 Stat. 672), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) (the

said Act of May 12, 1933, as reenacted and amended being hereinafter referred to as the "Act"), vesting the several district courts of the United States with jurisdiction specifically to enforce, and to prevent and restrain any
4 person from violating, any order issued by the Secretary of Agriculture of the United States pursuant to the provisions of Title I of said Act.

III.

This proceeding is brought to enforce the provisions of Order No. 41, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture of the United States (hereinafter referred to as the "Secretary") on August 28, 1939, effective September 1, 1939 (hereinafter referred to as the "order"), pursuant to the provisions of Section 8c of the Act, and to prevent and restrain the defendant from handling milk in violation of the provisions of said order. The order, marked "Exhibit A," is attached hereto and made a part hereof.

IV.

The order was issued by the Secretary in full compliance with law. All conditions precedent to the effectiveness of said order have occurred. The order was published in the Federal Register on August 30, 1939, and an order of the Secretary making Order No. 41 effective as of September 1, 1939 was published in the Federal Register, volume IV, page 167, on August 30, 1939. The order has been continuously in effect from the effective date thereof to and including the date of the filing of this complaint.

V.

The purpose of the order is to effectuate the declared policy of the Act by establishing and maintaining such orderly marketing conditions in the Chicago, Illinois, Marketing Area (hereinafter referred to as the "area") as will reestablish prices to be paid to producers of milk sold
5 in the area at a level which will give such milk a purchasing power with respect to articles that such producers buy equivalent to the purchasing power of such

milk during the base period fixed in accordance with the provisions of Section 8c of the Act.

VI.

The defendant, Wrightwood Dairy Company, since prior to the effective date of the order, has been engaged continuously in purchasing and receiving milk from producers, associations of producers, or other handlers, all, or a portion of which milk is disposed of as milk or cream in the marketing area. It is alleged upon information and belief that defendant purchases its milk from producers located within the State of Illinois, but due to the failure and refusal of said defendant to file reports as required by the provisions of said order, the quantity of milk handled by defendant is unknown to the plaintiff. The milk handled by said defendant is processed by defendant in its plant in Chicago and is sold and distributed within the area in competition with all other milk handled in said area. Such handling of milk by said defendant is in the current of interstate commerce as defined in Section 10(j) of the Act, or directly burdens, obstructs, or affects interstate commerce in milk marketed within the area , and said defendant is, therefore, a handler of milk as defined in Section 8c(1) of the Act and in Section 941.1(4) of the order, and as such is subject to the applicable provisions of the Act and of the order.

VII.

The milk sold and distributed in the area is produced in four states, Illinois, Indiana, Wisconsin, and Michigan.

6 Approximately sixty per cent. of the total quantity is produced in Illinois, approximately twenty-three per cent. is produced in Wisconsin, approximately sixteen per cent. is produced in Indiana, and approximately one per cent. is produced in Michigan. Approximately forty per cent. of all the milk sold and distributed in the area, therefore, is directly in the current of interstate commerce. Substantial quantities of the milk produced within the State of Illinois, prior to its ultimate disposition by handlers, is physically and inextricably intermingled in the processing plants of handlers with milk which has crossed state lines. Unless all milk produced for sale in the area, whether or not physically intermingled, is subject to the

same regulation as the milk which has crossed state lines on its way into the area, discrimination will result against the milk which has moved in the current of interstate commerce, as such milk will be unable to compete with unregulated milk in the area. Such discrimination would lead to unstable and disorderly marketing conditions and prevent the effectuation of the purpose of the Act.

VIII.

Under the provisions of Section 941.3 of the order, each handler in the area is required to file reports covering each monthly delivery period with the market administrator which will show, among other things, his purchases, receipts, and sales of milk and the uses for which such milk is sold; and, based upon such reports, the market administrator in accordance with the provisions of Section 941.7 of the order, is required to compute the uniform prices to be paid by all handlers to all producers for milk supplied to the area. The failure or refusal of any handler to make the required reports renders it impossible for the market administrator accurately to make such computations and, if the handler handles a high percentage of Class I milk results in lower uniform prices and defeats the
7 purposes of the Act. The defendant has failed and refused to make the required reports despite repeated requests by the market administrator that he do so and offers of assistance in the making of said reports.

IX.

Section 941.8, paragraph (c), of the order requires each handler on or before the 14th day after the end of each monthly delivery period to pay to the market administrator for deposit in the Producer-Settlement Fund, established pursuant to Section 941.8, paragraph (b), of the order, the amount by which the total value of the milk purchased or received by him from producers during the said delivery period, computed at the class prices set forth in the order in accordance with Section 941.5 of the order, is greater than the amount obtained by multiplying the hundredweight of milk purchased and received from producers by the uniform price computed and announced for such delivery period by the market administrator, in accord-

ance with Section 941.7 of the order. Section 941.8, paragraph (d), of the order requires the market administrator, on or before the 15th day after the end of each delivery period, to pay out of the Producer-Settlement Fund to each handler, for payment to producers, the amount, if any, by which the total value (computed as aforesaid) of the milk purchased or received by him from producers during such delivery period is less than the amount obtained by multiplying the hundredweight of such milk purchased or received from producers by such handler by the uniform price aforesaid. It is alleged upon information and belief that defendant sells a high percentage of Class I milk and, therefore, would be required to pay into said Producer-Settlement Fund for the delivery periods during the effective period of the order and his failure and refusal to comply with the aforesaid provisions of the order deprives the producers in the market of money which is rightfully theirs.

8

X.

Under the provisions of Section 941.9 of the order, each handler in the area is required to contribute his pro rata share of the expense of the administration of the order at a rate not to exceed two cents per hundredweight with respect to all milk purchased or received by him during each delivery period or produced by him. Defendant has contributed nothing under said provision since the effective date of the order.

XI.

Defendant is a competitor of other handlers in the area and, unless it is restrained immediately from continuing to violate the order and is compelled to comply with all of the provisions thereof, other handlers will be encouraged, or impelled by economic pressure to refuse to comply with the provisions of the order; the prices received by producers of milk will be lower than they should be under the terms of the order; commerce in milk among the several states will be disrupted, burdened, and obstructed; the lawful regulation of such commerce, as provided in the Act, will be rendered ineffective; the declared policy of Congress will be defeated; and the plaintiff will suffer irreparable injury.

Wherefore, plaintiff demands:

(1) That the Court issue a preliminary injunction preventing and restraining the defendant, its agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with it, from violating any of the provisions of Order No. 41 during the pendency of this suit, and commanding the defendant, its agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with int, to comply with all of
9 the provisions of said Order No. 41 during the pendency of this suit.

(2) That the Court issue a permanent injunction preventing and restraining the defendant, its agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with it, from violating the provisions of Order No. 41, regulating the handling of milk in the area, and commanding the defendant, its agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with it, to comply with all the provisions of said Order No. 41.

(3) That the plaintiff be given all such other, further, and different relief as this Court may deem just.

William J. Campbell,
United States Attorney.

Mary Connor Myers,
Principal Attorney, Solicitor's Office,
Department of Agriculture, Washington, D. C.

10 District of Columbia, } ss.
City of Washington. }

O. M. Reed, being first duly sworn, deposes and says that he is Acting Chief of the Dairy Section, Division of Marketing and Marketing Agreements, Department of Agriculture of the United States; that he makes this affidavit on behalf of the plaintiff in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

O. M. Reed.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 18 day of December, 1939.

Alfred L. Dorf,
(Seal) *Notary Public, District of Columbia.*

11 "EXHIBIT A."

12 O-41 Issued August 28, 1939

UNITED STATES DEPARTMENT OF AGRICULTURE

Division of Marketing and Marketing Agreements

T. 7, Ch. IX, Code of Fed. Regs.

Marketing Orders—Part 941

Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area[1]

Contents

		Page
Sec. 941.0	Findings.	2
941.1	Definitions.	3
941.2	Market administrator.	3
941.3	Reports of handlers.	4
941.4	Classification of milk.	5
941.5	Minimum prices.	5
941.6	Application of provisions.	6
941.7	Determination of uniform prices to producers.	7
941.8	Payment for milk.	7
941.9	Expense of administration.	9
941.10	Marketing services.	9
941.11	Market advisory committee.	10
941.12	Effective time, suspension, or termination of order.	10
941.13	Liability.	11

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, (50 Stat. 246) the Secretary of Agriculture of the United States is empowered, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others

1. Section 941.0 to and including Section 941.13 issued under the authority contained in 48 Stat. 31 (1933), 7 U. S. C. 601 et seq. (1934); 49 Stat. 750 (1935); 50 Stat. 246 (1937) 7 U. S. C. 601 et seq. (Sup. IV. 1938).

engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, under the terms and provisions of said act, the Secretary of Agriculture is empowered to issue orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in sub-section (2) of section 8c, such orders to regulate only such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary of Agriculture, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the Chicago, Illinois, marketing area would tend to effectuate the declared policy of said act, gave, on the 9th day of June 1939, notice of a public hearing which was held at Chicago, Illinois, from June 26 through June 30, 1939, at which time and place all interested parties were afforded an opportunity to be heard on a proposed marketing agreement and a proposed order; and

Whereas, after such hearing and after the tentative approval on the 18th day of August 1939, by the Secretary, of marketing agreement, handlers of more than fifty percent of the volume of milk covered by such order which was marketed within the Chicago, Illinois, marketing area, as defined in this order, refused or failed to sign such tentatively approved marketing agreement relating to milk; and

Whereas, the Secretary determined, on the 24th day of August 1939, said determination being approved by the President of the United States on the 26th day of August 1939, that said refusal or failure tends to prevent the effectuation of the declared policy of said act, that the issuance of this order is the only practical means, pursuant to such policy, of advancing the interests of producers of milk in said area, and that this order is approved or favored by over 67 percent of the producers voting in a referendum conducted by the Secretary, who, during the month of April 1939, said month having been determined by the Secretary to be a representative period, were engaged in

the production of milk for sale in the Chicago, Illinois, marketing area; and

Whereas, the Secretary has found and proclaimed the period August 1919—July 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois, marketing area; and

Whereas, the Secretary herewith finds that a pro-rata assessment on handlers, as set forth in section 9 of this order, at a rate not to exceed 2 cents per hundredweight on all milk received from producers during each delivery period, will provide funds necessary to pay such expenses, while such order is in effect, as will necessarily be incurred by the market administrator under such order for the maintenance and functioning of said market administrator; and

Section 941.0 Findings. Whereas, the Secretary finds upon the evidence introduced at said public hearing:

1. That all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products;

2. That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market supply of and demand for such milk, and that the minimum prices set forth in this order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

3. That this order regulates the handling of milk in the same manner as, and is applicable only to handlers defined in the marketing agreement upon which hearings have been held; and

4. That orderly marketing conditions for milk flowing into the Chicago, Illinois, marketing area are so disrupted as to result in the impairment of the purchasing power of

2

13 such milk and that the issuance of this order, and all of its terms and conditions, will tend to effectuate the declared policy of the act.

Now, Therefore, the Secretary of Agriculture, pursuant

to the powers conferred upon him by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, hereby orders that such handling of milk in the Chicago, Illinois, marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof, conform to and be in compliance with the following terms and conditions:

Sec. 941.1 Definitions. (a) Terms. The following terms as used herein shall have the following meanings:

(1) The term "Chicago, Illinois, marketing area," hereinafter called the "marketing area," means the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe, all in the State of Illinois.

(2) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(3) The term "producer" means any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such plant.

(4) The term "handler" means any person who, on his own behalf or on behalf of others, purchases or receives milk from producers, associations of producers, or other handlers, all, or a portion, of which milk is disposed of as milk or cream in the marketing area; and who, on his own behalf or on behalf of others engages in such handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any cooperative association or handler with respect to the milk of any producer which is causes to be delivered to a plant from which no milk or cream is disposed of in the marketing area, for the account of such cooperative association or handler, and for which such cooperative association or handler collects payments.

(5) The term "market administrator" means the agency which is described in Sec. 941.2 for the administration hereof.

(6) The term "delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(7) The term "cooperative association" means any cooperative association of producers which the Secretary determines (a) to have its entire activities under the control of its members, and (b) to have and to be exercising full authority in the sale of milk of its members.

(8) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(9) The term "Secretary" means the Secretary of Agriculture of the United States.

Sec. 941.2 Market administrator. (a) Designation. The agency for the administration hereof shall be a market administrator who shall be a person selected by the Secretary.

3

Such person shall be entitled to such compensation as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

(b) Powers. The market administrator shall:

(1) Administer the terms and provisions hereof; and

(2) Report to the Secretary complaints of violation of the provisions hereof.

(c) Duties. The market administrator shall:

(1) Within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

(2) Pay, out of the funds provided by Sec. 941.9, the cost of his bond, his own compensation, and all other expenses necessarily incurred in the maintenance and functioning of his office.

(3) Keep such books and records as will clearly reflect the transactions provided for herein, and surrender the same to his successor or to such other person as the Secretary may designate.

(4) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 4 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to Sec. 941.3 or (b) made payments pursuant to Sec. 941.8.

(5) Promptly verify the information contained in the reports submitted by handlers,

Sec. 941.3 Reports of handlers. (a) Submission of Reports. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 7th day after the end of each delivery period (a) the receipts of milk at each plant from producers, (b) the receipts of milk at each plant from handlers, (c) the receipts at each plant of the milk, if any, produced by him, (d) the utilization of all receipts of milk for the delivery period, and (e) the name and address of each new producer.

(2) Within 10 days after the market administrator's request with respect to any producer for whom such information is not in the files of the market administrator and with respect to a period or periods of time designated by the market administrator (a) the name and address, (b) the total pounds of milk delivered, (c) the average butterfat test of milk delivered, and (d) the number of days upon which deliveries were made.

(3) On or before the 20th day after the end of each delivery period, his producer pay roll, which shall show for each producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of payment to such producer made pursuant to Sec. 941.8, and (c) any deductions and charges made by the handler.

(4) On or before the 7th day after the end of such delivery period, the sale or disposition of milk outside the marketing area, pursuant to Sec. 941.5 (c) as follows: (a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the date of such sale or disposition, (d) the point of use, (e) the plant from which such milk is shipped, and (f) such other information with respect thereto as the market administrator may require.

(b) Verification of Reports. Each handler shall make available to the market administrator or his agent (1) those

14 records which are necessary for the verification of the information contained in the reports submitted in accordance with this section, and (2) those facilities necessary for the checking of the weighing and sampling of milk and for determining the utilization of milk by the handler.

Sec. 941.4 Classification of milk. (a) Basis of classification. All milk purchased or received by a handler from

producers, associations of producers, and other handlers, including milk produced by him, if any, shall be classified by the market administrator in the classes set forth in paragraph (b) of this section.

(b) Classes of utilization. The classes of utilization of milk shall be as follows:

(1) Class I milk shall be all milk disposed of in the form of fluid milk, and all milk not accounted for as Class II milk or Class III milk.

(2) Class II milk shall be all milk, except skimmed milk, disposed of in the form of flavored milk and flavored milk drinks, all milk used to produce cottage cheese, and all milk used to produce cream which is disposed of in the form of cream (for consumption as cream), ice cream, and ice cream mix.

(3) Class III milk shall be all milk used to produce a milk product other than one of those specified in Class II, and all milk accounted for as actual plant shrinkage, but not to exceed 2 percent of the total receipts of milk from producers.

(c) Interhandler and nonhandler sales. Milk disposed of by a handler to another handler, and milk disposed of by a handler to a person who is not a handler but who distributes milk or manufactures milk products shall be classified as Class I milk; Provided, That if the selling handler on or before the 7th day after the end of the delivery period furnishes to the market administrator a statement which is signed by the buyer and seller that such milk was disposed of as Class II milk or Class III milk, such milk shall be classified accordingly, subject to verification by the market administrator.

Sec. 941.5 Minimum prices. (a) Class prices. Except as set forth in paragraph (c) of this section and subject to the location adjustment set forth in paragraph (b) of this section, each handler shall pay, at the time and in the manner set forth in Sec. 941.8, for milk purchased or received from producers by such handler at any plant, platform, or loading station located not more than 70 miles from the City Hall in Chicago, not less than the following prices:

Class I milk—Add to the price per hundred weight for milk of 3.5 percent butterfat content computed pursuant to the formula as set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 70 cents per hundredweight for the months of July,

August, September, October, and November; 55 cents per hundredweight for the months of December, January, February, March, and April; and 45 cents per hundredweight for the months of May and June: Provided, That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $1.395 per hundredweight.

Class II milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula as set forth in section 1 of article VI of the

5

marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 32 cents per hundredweight for the months of July, August, September, October, and November; 28 cents per hundredweight for the months of December, January, February, March and April; and 25 cents per hundredweight for the months of May and June.

Class III milk—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 20 percent: Provided, That in the event Class III milk is used to produce evaporated or condensed milk handlers shall pay a price per hundredweight computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any.

(b) Location adjustments to handlers. With respect to milk purchased or received from producers at a plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, which is classified as Class I milk and as Class II milk (and transported to any point within such 70-mile zone), there shall be deducted 2 cents per hundredweight and ½ cent per hundredweight, respectively, for each additional 15 miles or part thereof that such plant, platform, or loading station is located in excess of 70 miles from the City Hall in Chicago. There shall be no location adjustment to handlers with respect to Class III milk. For the purposes of this paragraph Class I milk shall be considered to be that milk received from producers at plants,

platforms, or loading stations located nearest the marketing area from which whole milk is shipped to the marketing area.

(c) Sales outside the marketing area. The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be the price, as ascertained by the market administrator, which is being paid in the market where such milk is disposed of, for milk of equivalent use: Provided, That in the event such Class I milk is disposed of outside the 70-mile zone from a plant at which milk is received from producers and which is located more than 70 miles from the City Hall in Chicago, such price as ascertained by the market administrator shall be adjusted by an amount equal to the carload freight rate approved by the Interstate Commerce Commission for the movement of milk in 40-quart cans from the shipping point for the plant where such milk is received from producers to the railroad delivery point serving the market where such milk is utilized as Class I milk.

Sec. 941.6 Application of provisions. (a) Handlers who are also producers. (1) No provision hereof shall apply to a handler who is also a producer and who purchases or receives no milk from producers or an association of producers, except that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(2) In the case of a handler who is also a producer and who purchases or receives milk from producers or an association of producers, the market administrator, before making the computations set forth in Sec. 941.7, shall (a)

exclude the milk purchased or received by him in each class from other handlers, (b) exclude from his remaining Class I milk and Class II milk up to but not exceeding 95 percent of the quantity of milk produced and disposed of by him, and (c) exclude from his remaining Class III milk the balance of the milk produced and disposed of by him.

(3) The market administrator, in computing the value of milk for any handler pursuant to Sec. 941.7, shall consider as Class III milk any milk or cream received in bulk by such handler from a handler who distributes part of his

own production. If the receiving handler disposes of such milk or cream for other than Class III purposes; the market administrator shall add to the total value computed pursuant to Sec. 941.7 the difference between (a) the value of such milk or cream at the Class III price and (b) the value according to its actual usage.

Sec. 941.7 Determination of uniform prices to producers. (a) Computation of value of milk for each handler. For each delivery period the market administrator shall compute, subject to the provisions of Sec. 941.6, the value of milk for each handler which was purchased or received from producers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to Sec. 941.5, and (b) adding together the resulting values of each class.

(b) Computation and announcement of uniform prices. The market administrator shall compute and announce the uniform price per hundredweight of milk for each delivery period in the following manner:

(1) Combine into one total the respective values of milk computed pursuant to paragraph (a) of this section, for each handler who made the reports pursuant to Sec. 941.3 (a) for such delivery period;

(2) Add the amount of the location differentials applicable pursuant to Sec. 941.8 (g);

(3) Add the amount of cash balance in the producer-settlement fund;

(4) Divide by the total quantity of milk represented in the computations pursuant to paragraph (a) of this section;

(5) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in the producer-settlement fund; and

(6) On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the price of Class I milk, Class II milk, and Class III milk used in such computations.

Sec. 941.8 Payment for milk. (a) Time and method of payment. On or before the 15th day after the end of each delivery period each handler shall pay each producer, for milk purchased or received during the delivery period, an amount of money representing not less than the total value

of such milk, at the uniform price per hundredweight, computed pursuant to Sec. 941.7 (b) and subject to the butterfat differential and location adjustments set forth in this section.

(b) Producer-settlement fund. The market administrator shall establish and maintain a separate fund known as "the producer-settlement fund" into which he shall deposit

7

all payments made by handlers pursuant to paragraphs (c) and (e) and out of which he shall make all payments to handlers pursuant to paragraphs (d) and (e) of this section.

(c) Payments to the producer-settlement fund. On or before the 14th day after the end of each delivery period each handler shall pay to the market administrator the amount by which the total value of the milk purchased or received by him from producers during the delivery period is greater than the amount obtained by multiplying the hundredweight of milk purchased and received from producers by the uniform price.

(d) Payments out of the producer-settlement fund. On or before the 15th day after the end of each delivery period, the market administrator shall pay to each handler for payment to producers the amount, if any, by which the total value of such milk purchased or received from producers by such handler is less than the amount obtained by multiplying the hundredweight of such milk purchased or received from producers by such handler by the uniform price. If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler who, on the 15th day after the end of each delivery period, has not received the balance of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer-settlement fund.

(e) Adjustments of errors in payments. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (c)

of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

(f) Butterfat Differential. If any handler has purchased or received from any producer, during any delivery period, milk having an average butterfat content other than 3.5 percent, such handler, in making the payments pursuant to paragraph (a) of this section to such producer, shall add for each one-tenth of 1 percent of average butterfat content above 3.5 percent not less than, or shall deduct for each one-tenth of 1 percent of average butterfat content below 3.5 percent not more than, 4 cents per hundredweight.

(g) Location adjustments to producers. In making payments to producers pursuant to paragraph (e) of this

section, handlers shall deduct with respect to all milk purchased or received from producers at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, the amount specified as follows:

Within 70 to 85 miles	2 cents per hundredweight.
Within 86 to 100 miles	4 cents per hundredweight.
Within 101 to 115 miles	6 cents per hundredweight.
Within 116 to 130 miles	8 cents per hundredweight.
Within 131 to 145 miles	10 cents per hundredweight.
Within 146 to 160 miles	12 cents per hundredweight.
Within 161 to 175 miles	14 cents per hundredweight.
For each 15 miles or part thereof beyond 176 miles from the City Hall of Chicago, an additional	½ cent per hundredweight.

Sec. 941.9. Expense of administration. (a) Payments by handlers. As his pro-rata share of the expense of the administration hereof each handler, except those handlers exempt from the provisions hereof as set forth in Sec. 941.6 (a), shall pay to the market administrator, on or before the 15th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with respect to all milk purchased or received by him during such delivery period from producers, or produced by him, the exact sum to be determined by the market administrator, subject to review by the Secretary: Provided, That each handler which is a cooperative association shall pay such pro-rata share of expense of administration only on that milk of producers actually received at a plant of such cooperative association, or caused to be delivered by such cooperative association to a plant from which no milk or cream is disposed of in the marketing area.

(b) Suits by market administrator. The market administrator may maintain a suit in his own name against any handler for the collection of such handler's pro-rata share of expense set forth in this section.

Sec. 941.10. Marketing services. (a) Marketing service deduction. In making payments to producers pursuant to Sec. 941.8, each handler, with respect to all milk received from each producer during each delivery period, except as set forth in paragraph (b) of this section, shall deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, such determination to be subject to review by the Secretary, and shall, on or before the 15th day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator for verification of weights, samples, and tests of milk received from such producers and in providing for market information to such producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk received from, such producers.

(b) Marketing service deductions with respect to members of a producers' cooperative association. In the case of producers for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section each handler shall, in lieu of the deductions spe-

cified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 941.8 as may

be authorized by such producers, and pay over on or before the 15th day after the end of each delivery period such deductions to the associations rendering such service of which such producers are members.

Sec. 941.11 Market advisory committee. (a) Subsequent to the effective date hereof, the market administrator may select a representative committee of the industry for purposes (1) of recommendation of amendments to this order, and (2) for conference, counsel, and advice.

Sec. 941.12 Effective time, suspension, or termination of order. (a) Effective time. The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended, or terminated, pursuant to paragraph (b) of this section.

(b) Suspension or termination of order. The Secretary may suspend or terminate this order or any provision hereof whenever he finds that this order or any provision hereof obstructs or does not tend to effectuate the declared policy of the act. This order shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

(c) Continuing power and duty of the market administrator. If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination: Provided, That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(1) The market administrator, or such other person as the Secretary may designate, shall (a) continue in such capacity until removed by the Secretary, (b) from time to time account for all receipts and disbursements, and when so directed by the Secretary deliver all funds on hand, together with the books and records of the market adminis-

trator or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

(d) Liquidation after suspension or termination. Upon the suspension or termination of any or all provisions hereof the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

10

Sec. 941.13 Liability. (a) Liability of handlers. The liability of the handlers hereunder is several and not joint, and no handler shall be liable for the default of any other handler.

Now, Therefore, Harry L. Brown, Acting Secretary of Agriculture, acting under the provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, for the purposes and within the limitations therein contained and not otherwise, hereby executes and issues in duplicate this order, under his hand and the official seal of the Department of Agriculture, in the city of Washington, District of Columbia, on this 28th day of August 1939, and declares this order to be effective on and after the 1st day of September 1939.

Harry L. Brown,
Acting Secretary of Agriculture.

(Seal)

11

18 And on, to wit, the 17th day of January, A. D. 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Motion for Preliminary Injunction and Affidavits, in words and figures following, to wit: Filed Jan. 17, 1940.

19 (Caption)

NOTICE OF MOTION.

To: Wrightwood Dairy Company,
Defendant in the above-styled cause.

Please take notice that upon the verified complaint in the above-styled cause, and upon the attached affidavits of Nikitas J. Cladakis and Otie M. Reed, the plaintiff will move for a preliminary injunction, as prayed in the complaint and on the grounds therein set forth, at the United States Courthouse, at Chicago, Illinois, before the Honorable Charles Edgar Woodward, on the 17th day of January, 1940, at 1:30 o'clock, P. M., or as soon thereafter as counsel can be heard.

Wm. J. Campbell,
Wm. J. Campbell,
United States Attorney.
U. S. Courthouse,
Chicago, Illinois.

John S. L. Yost,
John S. L. Yost,
Special Asisstant to the Attorney General,
Department of Justice,
Washington, D. C.

Mary Connor Myers,
Mary Connor Myers,
Principal Attorney, Solicitor's Office,
Departure of Agriculture,
Washington, D. C.

20 (Caption)

MOTION FOR PRELIMINARY INJUNCTION.

Comes now the plaintiff in the above-entitled case, by William J. Campbell, United States Attorney in and for the Northern District of Illinois, Eastern Division, and moves the Court to grant a writ of injunction against defendant, and those controlled by defendant, pending this suit, and until the further order of the Court, conformably to the demand of the complaint in said case filed.

Dated: January 11, 1940.

William J. Campbell,
United States Attorney.

John S. L. Yost,
John S. L. Yost,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

Mary Connor Myers,
Mary Connor Myers,
Principal Attorney, Solicitor's Office.
Department of Agriculture,
Washington, D. C.

21 AFFIDAVIT OF NIKITAS J. CLADAKIS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Nikitas J. Cladakis, being duly sworn, deposes and says:

That he is Federal Milk Market Administrator for the Chicago marketing area, appointed September 1, 1939, by the Secretary of Agriculture to administer Order No. O-41, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture on August 28, 1939, effective September 1, 1939; that prior to said appointment he was with the Agricultural Adjustment Administration of the Department of Agriculture for six years, and still earlier was attached to the Bureau of Foreign and Domestic Commerce of the Department of Commerce; and that he received his education at the University of Florida, West Point, the London School of Economics, the Academy of International Law at the

Hague, the Foreign Service School of Georgetown University, and Georgetown University Law School.

22 That he is familiar with the information and data submitted to the Secretary of Agriculture during the public hearings held prior to the promulgation of Order No. O-41, including those figures relating to general conditions of supply and demand throughout the milk shed within which milk is produced for sale in the above-mentioned marketing area.

That he makes this affidavit in support of the motion by the plaintiff for preliminary injunction in the above-entitled case.

In accordance with the customary practice in the market, three classes of milk are established by the order. Class I milk includes all milk disposed of in the form of fluid milk. Class II milk includes all milk disposed of in the form of flavored milk and flavored milk drinks, all milk used to produce cottage cheese, and all milk used to produce cream (for consumption as cream), ice cream and ice cream mix. Class III milk includes all milk used to produce a milk product other than one of those specified in Class II, and all milk accounted for as actual plant shrinkage, but not to exceed 2 per cent of the total receipts from producers.

The prices for Class II milk and Class III milk are designed to reflect competitive price relationships in the supply area and are deemed to be fair in view of current conditions.

After milk of a handler has been classified into the three classes of utilization, the cost of milk is determined by multiplying the volume of milk in each class by the applicable class price. Location adjustments are provided with respect to milk received at a plant located more than 70 miles from the City Hall in Chicago; such adjustments are designed to compensate the handler for the actual cost of moving such milk to the marketing area.

23 The plan incorporated in the order for paying producers is simply a plan whereby all producers receive a uniform price for their milk. It is commonly called the equalization plan. Equalization of fluid milk sales is simply an extension of the same plan for paying producers which has always been used by each handler and by cooperatives. If a creamery used 75 per cent of its milk as fluid milk and the remainder as cream, it did not pay 75 per cent of its producers the fluid milk price and the remaining 25 per cent

the cream price. Such a method obviously would have been inequitable even if possible. Instead, each producer received the fluid milk price of 75 per cent of his milk and the cream price for the remaining 25 per cent. In the same way the plan in the order distributes the proceeds from the total sales of milk in the whole market among all producers. Each producer is assured an equitable share of the market, no matter how the handler to whom he delivers milk utilizes such milk.

During past years in the Chicago market, as in other markets, there has been much destructive competition among handlers, producers, and associations of producers to obtain a share of the fluid milk sales and to relieve themselves of part of the burden of surplus milk. The fluid milk sales, as has been pointed out, are relatively constant for the market as a whole. Any increase of fluid milk sales by one group necessarily means a corresponding decrease in such sales by another group. It is the purpose of the equalization plan to distribute the proceeds from all milk sales equitably among all producers, thus equalizing the burden of surplus milk.

The Market Administrator acts only as a clearing house, debiting each handler for the cost of milk and crediting him for the payments to be made his own producers. He then bills only those handlers whose debits are larger than their credits and pays the amounts collected to those
24 handlers whose credits are larger than their debits.

The result is that each handler pays according to use exactly the same price for his milk as his competitors. Each producer is paid a blended price based on the total utilization of milk in the market irrespective of the use of his milk by the particular handler to whom he delivers. This procedure does not result in taking profits from one handler and giving them to another. The money which is turned over to the Market Administrator by some handlers, and which in turn the Market Administrator turns over to other handlers, is not retained by the latter but is paid out to producers.

It is obvious that a handler through violation of the order can pay its own producers a higher composite price than its competitors and yet be receiving its milk at a lower cost. Such a condition is possible if the fluid milk market price of fluid milk is substantially above that for milk used to produce cream and other dairy products.

Those handlers who are participating in the equalization program cannot continue to meet the competition of non-complying handlers who are receiving their milk at a lower cost, and sooner or later destructive competition will set in and prices will be reduced to ruinously low levels. The cost of competition is usually borne by producers and thus the supply and quality of milk to consumers is greatly endangered. Without sufficient control such a result is inevitable and has been experienced many times in this market, even as recently as the first half of 1939.

That the Wrightwood Dairy Company is a handler in the Chicago marketing area and purchases approximately 16,500 pounds of milk per day from approximately 66 producers located in Illinois, and purchases, also, some 25 milk from other handlers; and that the Wrightwood Dairy Company has failed and refused to make any reports to the Market Administrator as all handlers are required to do under the provisions of Section 941.3 of the Order, without which information it is impossible for the Market Administrator accurately to compute the blended price to be paid for milk during any delivery period by all handlers to all producers in the marketing area.

That defendant has not paid its pro rata share of the expense of administering Order No. O-41, as required by Section 941.9 thereof.

That defendant has not deducted the marketing service charge which every handler is required to deduct from payments to producers and to pay to the Market Administrator to enable him to provide weight verification, samples and tests of milk, and market information to producers not members of cooperative organizations, which producers supplying defendant are not, all in accordance with Section 941.10 of Order No. O-41.

That failure and refusal of any handler in the marketing area to comply with provisions of the order becomes known throughout the market promptly and acauses immediate unrest and if permitted to continue leaves to complying handlers only two alternatives: (1) to violate the order to meet the competitive advantage of non-complier, or (2) to compete with an unregulated handler who has a price advantage equal to the amounts of administrative and marketing service assessments; and experience has shown that the first alternative is invariably chosen.

Nikitas J. Cladakis.

Subscribed and sworn to before me this 18 day of December, 1939.

Alfred L. Dorf,
(Seal) *Notary Public.*

26 AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Otie M. Reed, having first been duly sworn, deposes and says:

That he is the Acting Chief of the Dairy Section, Division of Marketing and Marketing Agreements, United States Department of Agriculture, and, as such, is directly responsible for the supervision of the development, promulgation, and administration of orders issued by the Secretary of Agriculture regulating the handling of milk and other dairy products; that he was a member of the staff of the Dairy Section from September 8, 1933, to February 5, 1939, first as Associate Agricultural Economist and later as Senior Agricultural Economist; that on February 6, 1939, he was appointed Principal Agricultural Economist and Acting Chief of the Dairy Section, which position he now holds; that from about January 1, 1935, until his appointment as Acting Chief of the Section, he was actively and directly in charge of analyses of all information gathered for the promulgation of programs operated in milk markets throughout the United States, which analyses involved interpreting masses of statistical data and general information and making recommendations thereon for the initiation and operation of such programs in effect, from time to time, in more than fifty milk markets, including the Chicago market.

That he has studied particularly the operation of Order No. O-41 regulating the handling of milk in the Chi-
27 cago Marketing Area and is familiar with the information and data submitted to the Secretary at the public hearings held prior to the promulgation of such order, including those figures relating to general conditions of supply and demand throughout the milk shed within which milk is produced for sale in the above-mentioned marketing area.

That he makes this affidavit in support of the motion

by the plaintiff for preliminary injunction in the above-entitled case.

The Chicago milk market was placed under Federal regulation September 1, 1939, at the urgent demand of producers suffering from low prices and disorderly marketing conditions: The record of the public hearing held June 26-30, 1939, at which evidence was adduced with respect to a proposed marketing program, which served as a basis for the issuance of Order O-41, indicated that a major portion of the Chicago milk supply was being marketed through producers' cooperative associations. The record showed, further, that in spite of the desire of many in the industry to maintain a semblance of orderliness in the marketing of milk in the Chicago market, a mad scramble had begun on the part of producer and handler groups for larger shares of the fluid milk business, and on the part of handlers for lower costs of milk. Most of the burden of the market surplus was borne by organized producers. Handlers not purchasing their supply from organized producers took advantage of this situation by paying their producers prices at or near the blended price received by organized producers. This condition obviously created a vast inequality among handlers with respect to the
28 cost of milk used for their fluid trade. Such differences in cost were in turn reflected in resale prices which created unfair competitive relationships in the market. Handlers who purchased their supply from organized producers and who paid a higher price for their fluid milk (Class I) requirements found it necessary to bargain for lower prices in order to maintain their resale outlets.

A glaring example of how such chaotic market conditions can adversely affect the economic plight of producers occurred in June 1939, the month during which the public hearing was held. For several months prior thereto, organized producers had sold their milk on the basis of a specified premium over the price for milk used for evaporating purposes in the normal supply area, thus giving recognition to local competitive conditions. Over an extended period, the premium was 53 cents per hundredweight over the evaporated milk price, and was presumed to apply to a quantity of milk equal to 120 per cent of the handlers' fluid milk sales. Milk received from producers in excess of such quantity of milk was paid for at a price closely approximating the evaporated milk price. By June 15, 1939, market conditions had become so chaotic that

organized producers were compelled to reduce their price from a figure equaling the evaporated milk price plus 53 cents to one of only 35 cents over the evaporated milk price. Even this reduction failed to bring about stability of the market as it still afforded handlers who purchased their supply of milk from unorganized producers opportunity to purchase such milk at flat prices (said to be
29 near the average price received by organized producers) and thus maintain a decided advantage as compared with some of their competitors. The substantial interstate movement of milk into the market made the problem one with which State authorities could not cope. It appeared, therefore, that a Federal regulatory program was necessary to stabilize and maintain prices to producers which would be fair and reasonable in view of current economic conditions in the area.

The economic status of producers supplying milk to the Chicago marketing area is indicated by (a) the farm price for milk sold wholesale in Illinois, Indiana, Wisconsin, and Michigan since 1929 (milk sold in the Chicago market originates in these four states), (b) gross income from milk produced in Illinois, Indiana, Wisconsin, and Michigan since 1929, (c) cash income from milk produced in Illinois, Indiana, Wisconsin, and Michigan since 1929, and (d) index numbers of prices paid by farmers for commodities purchased.

Since 1929 dairy farmers have experienced rather severe declines in prices for milk. In 1929 prices received by farmers for all milk sold wholesale in Illinois, Indiana, Michigan, and Wisconsin were $2.35, $2.50, $2.40, and $2.05 per hundredweight, respectively. In 1932 the farm price had declined to $1.35 per hundredweight in Illinois, $1.40 per hundredweight in Indiana, $1.10 per hundredweight in Michigan, and $0.89 per hundredweight in Wisconsin.

From 1935 to 1937 prices for milk increased steadily
30 in the States comprising the Chicago milkshed. In 1938 the farm prices for milk in Illinois, Indiana, Michigan, and Wisconsin were $1.65, $1.80, $1.70, and $1.28, respectively. The 1939 prices were lower than for 1936 and 1937 but somewhat higher than for any of the years from 1932-1935, inclusive. Farm prices for 1939 are slightly lower than for 1938.

The downward trend in the farm price for milk sold wholesale has been associated with a downward trend of

gross and cash income from milk sold in Illinois, Indiana, Wisconsin, and Michigan. In 1929 gross income from milk produced on farms in Illinois, Indiana, Wisconsin, and Michigan was $104,376,000, $68,110,000, $228,552,000, and $90,207,000, respectively. By 1933 gross income from milk stood at 41.3 percent, 46.8 percent, 52.2 percent, and 47.1 percent below the comparable figures for 1929 in Illinois, Indiana, Wisconsin, and Michigan, respectively. From 1933 to 1938 gross income from dairying had increased but still remained substantially below 1929; the gross income from dairying in 1938 being 20.0 percent, 23.8 percent, 34.1 percent, and 19.5 percent below the 1929 level in Illinois, Indiana, Wisconsin, and Michigan.

Cash income from dairy products in Illinois, Indiana, Wisconsin, and Michigan has followed a pattern similar to that for gross income. In 1938 cash income was 19.7 percent, 25.3 percent, 34.6 percent, and 19.5 percent below 1929 levels for Illinois, Indiana, Wisconsin, and Michigan, respectively.

Although gross and cash incomes from dairy products were materially lower in 1938 than in 1929, milk pro-
31 duction was greater. As indicated by preliminary figures, the volume of milk produced in 1938 was 13.9 percent, 5.8 percent, 7.3 percent, and 13.2 percent greater than in 1929 for Illinois, Indiana, Wisconsin, and Michigan, respectively.

Coupled with the rapid decline and only partial recovery, since 1929, of gross and cash income from milk sold wholesale, is the fact that farm prices for milk have declined more than prices which farmers must pay for the commodities they buy. The decrease in milk prices was more rapid, more severe and recovery has been slower. While the index of prices for commodities bought was 77 (1919-1929 = 100) in 1938, the index of prices received for milk sold wholesale for Illinois, Indiana, Wisconsin, and Michigan stood at 69.4, 71.1, 62.3, and 68.8, respectively.

The above data are indicative of the economic status of those particular producers supplying milk for the Chicago market as milk from the above-named States is marketed either in the form of milk or cream in the marketing area.

In the dairy business a decline in income is of particular importance. Milk offers an excellent medium for the growth of bacteria and must be constantly guarded against contamination. Because of its perishability and its im-

portance in the diet of the people, milk has for many years been the subject of local and State regulations as to conditions under which it may be produced and handled. Those safeguards necessarily increase the cost of producing and handling milk intended for consumption in
32 fluid form. But, whenever there is a severe decline in the income of dairy farmers, there is a tendency to relax in their vigilance and care against contamination of their milk and to forego making necessary replacements, repairs, and improvements in their producing plants. Herds are not maintained at their former standards, and equipment becomes worn and obsolete. The eventual result is a serious decrease in the supply and quality of milk available to consumers.

The disastrous decline in income to dairy farmers from 1929 to 1933 was caused in part by the general economic depression, but it was also caused in part by unstable marketing conditions in the handling of milk. The decline in the demand for milk resulted in price cutting by handlers to consumers. When prices to consumers were cut handlers tended to maintain their margins by reducing prices to producers. This was possible because handlers not purchasing their supplies through producer-cooperatives had a bargaining advantage over their producers since frequently there was no other outlet available to those producers. These producer-cooperatives soon had to reduce prices to meet this competition; i. e., price reduction in June 1939 previously referred to.

The unstable conditions prevalent in the handling of milk are largely due to factors inherent in the handling and production of milk. The seasonal fluctuations in milk production is much greater than the seasonal fluctuations in volume of milk sold to consumers as fluid milk. People do not vary their consumption of milk materially from season to season while cows normally freshen in the spring and produce their greatest flow of milk on pasture
33 during the early summer. Thus during the late spring and early summer, a considerable amount of milk is produced in excess of that needed for the fluid milk trade.

Milk, being bulky and highly perishable, cannot be stored. Milk not sold in fluid from must be converted immediately into cream or manufactured into other dairy products. Even with the best possible adjustment of supply to demand on a seasonal basis, the industry would

still have some surplus milk arising from daily fluctuations in demand.

All surplus milk must compete for a market with milk which does not need to meet the requirements of sanitation and production which are imposed on milk required for fluid milk and fluid cream, and is sold at a lower price than milk actually disposed of as fluid milk or in the form of fluid cream. The attempts of producers to shift the burden of this surplus milk and the efforts of some handlers to obtain their milk at a price lower than the prevailing price for milk used as fluid milk create markedly fluctuating prices to milk producers and unstable marketing conditions.

Full compliance on the part handlers with the terms and provisions of Order No. O-41, will not only obviate such unstable marketing conditions but will about fair competitive relationships as among handlers through uniform pricing of milk as provided in the act.

Interstate commerce.—The marketing area, as defined in Order No. I-41, is located in the State of Illinois. As previously stated, producers supplying the marketing
34 area are located in four States, namely, Illinois, Wisconsin, Indiana, and Michigan. The record of the public hearing held June 26-30, 1939, shows that for the period March 1934-February 1935 the source of the supply of milk sold in the Chicago marketing area is as follows: Sixty percent from Illinois; 23 percent from Wisconsin; 16 percent from Indiana, and 1 percent from Michigan. There is nothing in the record to indicate that any material change has occurred since that period with respect to the source of the Chicago milk supply. Further indication of the extent of interstate commerce of milk and its products in the Chicago area is exhibit No. 8 of the hearing record, which shows the location of 95 country plants at which milk is received for sale in Chicago. Of this total, 63 plants are located in Wiscinson, 30 plants are located in Illinois, 9 plants are located in Indiana, and 3 plants are located in Michigan. Approximately two-thirds of the total milk supply is received at these 95 country plants. Another indication of the movement of milk in interstate commerce was introduced into the hearing record by representatives of Pure Milk Association, the largest producers' organization in the market, who testified that approximately 59 percent of the milk

produced by members of such organization was on farms located in Illinois; 13 percent in Indiana; and 28 percent in Wisconsin. It appears, therefore, that approximately 40 percent of the total volume of milk sold in the Chicago, Illinois, marketing area is produced on farms located in Indiana, Wisconsin, and Michigan.

The plan of regulation prescribed by the Agricultural Marketing Agreement Act of 1937 and Order No. O-41, issued pursuant thereto, is such that it must, by reason of the economic forces inherent in it, be applicable to all handlers in the market, regardless of whether their marketing of milk is wholly intrastate in character or interstate in character. If handlers whose marketing of milk in the marketing area is wholly intrastate in character were exempted from compliance with Order No. O-41, and the plan of regulation were applicable only to handlers in the market whose marketing is interstate in character, the latter handlers would suffer serious discrimination. The handling of milk within the marketing area which is wholly intrastate in character directly burdens, obstructs, and affects the handling of milk in the marketing area which is interstate in character and, to avoid inequitable discrimination, all handlers in the market must be subjected to the same regulation.

Explanation of the provisions contained in Order No. O-41. The principle provisions contained in Order No. O-41 fall in three different categories, namely:

1. Those provisions which determine the persons to whom the order applies;

2. The cost of milk to handlers and the manner by which such cost is determined; and

3. Uniform prices to be paid producers and the mechanism provided therein which makes such uniform pricing provision possible.

Persons to whom the order applies are determined by the definitions of the terms "Chicago, Illinois, marketing area," "producer," and "handler." In simple language, a handler is a person who disposes of milk or cream in the marketing area which consists of the 36 cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe, all in the State of Illinois. A producer is any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the

marketing area. Therefore, any handler who receives milk from a producer at a plant, approved for the receiving of milk for sale in the marketing area, from which milk or cream therefrom is disposed of in the marketing area is subject to the terms and provisions of the order. The cost of milk to such handler and the price to be paid to such producers are specified therein.

The cost of milk to a handler is determined by (a) the classification of milk disposed of by him and (b) the applicable price for each class of milk.

The classified use plan prices which handlers shall pay are established according to the use made of such milk. This plan has been used in numerous markets for many years and has been used, with varying success, in the Chicago market since 1929.

Milk sold in the Chicago area for consumption as fluid milk, fluid cream, and ice cream must be produced and handled in a manner to conform to the sanitary requirements laid down by the city of Chicago or by other cities in the marketing area, as defined. The quantity of milk produced under such conditions is ample to meet the needs of the market for such uses.

In accordance with the customary practice in the market, three classes of milk are established by the order.

Class I milk includes all milk disposed of in the form
37 of fluid milk. Class II milk includes all milk disposed of in the form of flavored milk and flavored milk drinks, all milk used to produce cottage cheese, and all milk used to produce cream (for consumption as cream), ice cream and ice cream mix. Class III milk includes all milk used to produce a milk product other than one of those specified in Class II, and all milk accounted for as actual plant shrinkage, but not to exceed 2 percent of the total receipts from producers.

The Class I price set forth in the order was established after first applying the formula set forth in the act to the applicable statistics. By this means the so-called parity price as provided in the act was determined. An intense study was then made of the testimony and facts developed at the public hearing to determine the feasibility of such price. The price established in the order, was less than the "parity" price, but appeared sufficiently high to assure a volume of wholesome milk sufficient to meet market requirements, produced in conformity with the health reg-

ulations applicable to such milk, and to be feasible in view of the current demand in the market.

The prices for Class II milk and Class III milk are designed to reflect competitive price relationships in the supply area and are deemed to be fair in view of current conditions.

After milk of a handler has been classified into the three classes of utilization, the cost of milk is determined by multiplying the volume of milk in each class of the applicable class price. Location adjustments are provided with respect to milk received at a plant located more than
38 70 miles from the City Hall in Chicago; such adjustments are designed to compensate the handler for the actual cost of moving such milk to the marketing area.

The plan incorporated in the order for paying producers is simply a plan whereby all producers receive a uniform price for their milk. It is commonly called the equalization plan. Equalization of fluid milk sales is simply an extension of the same plan for paying producers which has always been used by each handler and by cooperatives. If a creamery used 75 percent of its milk as fluid milk and the remainder as cream, it did not pay 75 percent of its producers the fluid milk price and the remaining 25 percent the cream price. Such a method obviously would have been inequitable even if possible. Instead, each producer received the fluid milk price for 75 percent of his milk and the cream price for the remaining 25 percent. In the same way the plan in the order distributes the proceeds from the total sales of milk in the whole market among all producers. Each producer is assured an equitable share of the market, no matter how the handler to whom he delivers milk utilizes such milk.

During past years in the Chicago market, as in other markets, there has been much destructive competition among handlers, producers, and associations of producers to obtain a share of the fluid milk sales and to relieve themselves of part of the burden of surplus milk. The fluid milk sales, as has been pointed out, are relatively constant for the market as a whole. Any increase of fluid milk sales by one group necessarily means a corresponding decrease in such sales by another group. It is the pur-
39 pose of the equalization plan to distribute the proceeds from all milk sales equitably among all producers, thus equalizing the burden of surplus milk.

The mechanisms of an equalization program can be il-

lustrated by a simple example. In this example the following assumptions are made:

1. That there are only three handlers in the market.
2. That there is 3,000 hundredweight of milk used in the market equally divided among the three handlers.
3. That 1,500 hundredweight of the milk is used as Class I milk, 1,200 hundredweight as Class II milk, and 300 as Class III milk.
4. That the Class I price is $2.00 per hundredweight, the Class II price, $1.50 per hundredweight, and the Class III price $1.15 per hundredweight.
5. That Handler A utilizes 400 hundredweight as Class I, 400 hundredweight as Class II, and 200 hundredweight as Class III.
6. That Handler B utilizes 600 hundredweight as Class I, 300 hundredweight as Class II, and 100 hundredweight as Class III milk.
7. That Handler C utilizes 500 hundredweight as Class I and 500 hundredweight as Class II.

The Market Administrator (or any other agency in charge of the program) calculates the cost of milk to each handler as follows:

	Amount	Price	Total
Handler A			
Class I	400	$2.00	$800.00
Class II	400	1.50	600.00
Class III	200	1.15	230.00
Total	1000	$1.63	$1,630.00
Handler B			
Class I	600	$2.00	$1,200.00
Class II	300	1.50	450.00
Class III	100	1.15	115.00
Total	1000	$1.765	$1,765.00
Handler C			
Class I	500	$2.00	$1,000.00
Class II	500	1.50	750.00
Class III	None	1.15	
Total	1000	$1.75	$1,750.00

These total costs are then added making a total cost to all handlers of $5,145. There are 3,000 hundredweight which divided into $5,145 makes an average price of $1.709 per hundredweight. Each handler pays to each of his producers $1.709 per hundredweight for all milk delivered. But if Handler A pays $1.709 to his producers his milk would cost him more than it should cost on the basis of use, i. e., $1.63. Therefore he receives from the Market Administrator the difference. If Handler B paid his producers only $1.709 he would pay less than the milk should cost him on a use basis, i. e., $1.765. He must pay to the Market Administrator the difference. If Handler C pays his producers $1.709 he would also pay less than the milk should cost him on a use basis, i. e., $1.75 and he, also, must pay to the Market Administrator the difference. The Market Administrator acts only as a clearing house, debiting each handler for the cost of milk and crediting him for the payments to be made his own producers. He then bills only those handlers whose debits are larger than their credits and pays the amounts collected to those handlers whose credits are larger than their debits. The result is that each handler pays according to use exactly the same price for his milk as his competitors. Each pro-
41 ducer is paid a blended price based on the total utilization of milk in the market irrespective of the use of his milk by the particular handler to whom he delivers. This procedure does not result in taking profits from one handler and giving them to another. The money which is turned over to the Market Administrator by some handlers, and which in turn the Market Administrator turns over to other handlers, is not retained by the latter but is paid out to producers.

The illustration above demonstrates the simple principle of the blended price and equalization payments in Order No. O-41. The actual computation is somewhat more complicated by the necessity for certain differentials which must be included.

These differentials are to insure that natural competitive advantage of producers are preserved.

It is obvious that a handler through violation of the order can pay its own producers a higher composite price than its competitors and yet be receiving its milk at a lower cost. Such a condition is possible if the fluid milk market price of fluid milk is substantially above that for milk used to produce cream and other dairy products.

For example, assume that the Class I price in the market is $2.00 per hundredweight, the Class II price is $1.50 per hundredweight, and the Class III price is $1.15 per hundredweight; and in the market all handlers together use 50 percent of the milk produced as Class I, 40 percent as Class II, and 10 percent as Class III. If all han-
42 dlers were participating in equalization in the market each producer would receive per hundredweight:

50 pounds	at	$2.00	$1.00
40 pounds	at	$1.50	.60
10 pounds	at	$1.15	.115
Composite price			$1.715

Any one handler in the market might have used a larger portion of his milk as Class I than the average for the market. If he paid the full price for his milk to his producers the composite price would be higher to his producers and lower to all the other producers in the market. For example, if he had used 90 percent of the milk as Class I and 10 percent as Class II, the composite price would be:

90 pounds	at	$2.00	$1.80
10 pounds	at	$1.50	.15
Composite price			$1.95

Thus, if such handler paid his own producers only the price paid by other handlers participating in the pool, he would be receiving his milk at a price of more than $.235 per hundredweight less than his competitors. (More than $.235 because his not reporting would lower the market average of milk used as Class I and thus lower the composite price.) Such a handler could pay producers more than his competitors, say $1.85 per hundredweight, and yet not incur the same cost for his milk as his competitors.

43 Those handlers who are participating in the equalization program cannot continue to meet the competition of non-complying handlers who are receiving their milk at a lower cost, and sooner or later destructive competition will set in and prices will be reduced to ruinously low levels. The cost of competition is usually borne by producers and thus the supply and quality of milk to consumers is greatly endangered. Without sufficient control such a result is inevitable and has been experienced many

times in this market, even as recently as the first half of 1939.

Otie M. Reed.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 5th day of January, 1940.

Alfred L. Dorf,
(Seal) *Notary Public.*

44 State of Illinois }
County of Cook } ss:

Peter Intrieri, being first duly sworn, on oath, deposes and says that he is employed in the office of the United States Attorney at Chicago, Illinois; that on the 11th day of January, A. D. 1940, he placed a copy of the above and foregoing Notice of Motion, together with a copy of the Motion for Preliminary Injunction and Affidavits in support thereof, in an envelope addressed to the Wrightwood Dairy Company, 2942 North Ashland Avenue, Chicago, Illinois, said envelope bearing the return address of the United States Attorney, Chicago, Illinois; and that he placed said envelope, so addressed and containing said Notice of Motion, Motion for Preliminary Injunction, and Affidavits in support thereof, in the above entitled cause, in the depository for mail matter located on the main floor of the United States Court House, Chicago, Illinois, at the hour of approximately 12:00 A. M.

Peter Intrieri.

Subscribed and sworn to before me this 11th day of January, A. D. 1940.

Anna L. Minahan,
(Seal) *Notary Public.*

45. And on, to wit, the 17th day of January, A. D. 1940 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Consolidated Motions to the Complaint, in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES.

Filed Jan. 1940.

* * (Caption—1211) * *

CONSOLIDATED MOTIONS OF DEFENDANT, WRIGHTWOOD DAIRY COMPANY, TO THE COMPLAINT OF THE UNITED STATES OF AMERICA, PLAINTIFF.

The defendant moves the Court, as follows:

I.

Motion to Dismiss.

1. To dismiss the above entitled action because the complaint fails to state a claim against defendant upon which relief can be granted.

II.

Motion for More Definite Statement of the Nature of Plaintiff's Claim.

1. That the plaintiff be ordered to furnish a more definite statement of its claim of the following matters, which are not averred with sufficient definiteness of particularity to enable the defendant to prepare its responsive pleading to said complaint, and which information is entirely within the possession of the plaintiff and unknown to this defendant, which information and details desired are, as follows:

a) By setting forth the total number of producers who, during the representative period determined by the Secretary, have been engaged within the production area specified in the order marked Exhibit A and attached to and made a part of said complaint, in the production for market of the commodity specified therein.

47 b) By setting forth the total number of producers who during said representative period have been engaged in the production of such commodity for sale in the marketing area specified in said order marked Exhibit A and attached and made a part of said complaint.

c) By setting forth the total volume of the milk produced for market within the production area specified in said order referred to in said complaint, and attached there-

to as Exhibit A and made a part thereof, during the representative period determined by the Secretary as alleged in said complaint.

d) By setting forth the total volume of such commodity sold within the marketing area specified in said order mentioned and described in said complaint.

e) By setting forth the actual number of producers who during the representative period determined by the Secretary were engaged within the production area specified in such order in the production for market of the commodity specified therein who approved or favored said order.

f) By setting forth the actual number of the producers who during the representative period have been engaged in the production of such commodity for sale in the marketing area specified in such order who approved or favored said order.

g) By setting forth what amount in volume or production of such commodity produced for market within the production are specified in said order was approved or favored by producers thereof.

h) By setting forth what amount in volume of such commodity sold within the marketing area specified in such order was approved or favored by producers thereof.

48 i) By setting forth the number of producers who were requested by or notified by the Secretary of Agriculture of the United States to vote in the referendum mentioned and described in the order marked Exhibit A, and attached and made a part of said complaint.

j) By setting forth whether sixty-seven per cent (67%) of the total number of producers or sixty-seven per cent (67%) of the total volume of production approved or favored said order marked Exhibit A, and attached to said complaint and made a part thereof.

k) By setting forth the number of producers or the volume of production represented by producers who did not cast a vote in the referendum mentioned and described in the order marked Exhibit A, and attached and made a part of said complaint.

l) By setting forth why the "marketing area" was arbitrarily designated by the Secretary as the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe, which are located in a portion of Cook County, Illinois, but arbitrarily omitted other cities, towns and villages in the same

County which are also in the alleged current of interstate commerce.

m) By setting forth whether the prices to farmers as fixed by the order marked Exhibit A, and attached to the complaint, based upon the post-war period, August 1919-July 1929, as fixed by the Secretary in said order, is higher than the prices to farmers under the pre-war period, August 1909-July 1914.

Alvin E. Stein,
Alvin E. Stein,
10 South La Salle Street,
Chicago, Illinois,
Randolph 6727.
Pines, Stein & Beber,
Pines, Stein & Beber,
10 South La Salle Street,
Chicago, Illinois,
Randolph 6727.
Abraham Lepine,
Abraham Lepine,
Attorneys for the Defendant.

51 And on, to wit, the 29th day of January, A. D. 1940, came Joseph Sawa, President of Defendant Company, by his attorneys and filed in the Clerk's office of said Court his certain Affidavit in words and figures following, to wit: Filed Jan. 1940.

52 (Caption)

AFFIDAVIT OF JOSEPH SAWA IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.

State of Illinois } ss.
County of Cook }

Joseph Sawa being duly sworn, deposes and says that he is President of the Wrightwood Dairy Company, an Illinois corporation, defendant in the above entitled cause, and makes this affidavit in opposition to the motion of the plaintiff for a preliminary injunction in the above entitled cause.

Affiant further states that he has been engaged in the handling of milk in the City of Chicago, County of Cook and State of Illinois, since 1914; that the defendant Wrightwood Dairy Company was organized on April 5,

1932, under the Laws of the State of Illinois with its principal place of business in Chicago, Illinois, for the purpose of handling milk and milk products; that in connection with the operation of said business it acquired the premises commonly known as 2942-48 North Ashland Avenue, Chicago, Illinois, together with machinery, equipment, milk routes and other valuable personal property of the value in excess of One Hundred Thousand Dollars ($100,000.00).

This Affiant further states that the defendant, Wrightwood Dairy Company, purchases and for some time past has purchased approximately thirty thousand (30,000) pounds of milk per day from approximately seventy (70) producers located entirely within the State of Illinois, and no part thereof is purchased from any producers located outside the State of Illinois; that said milk is processed by said defendant in its plant in Chicago, and sold and
53 distributed within the State of Illinois, and that no portion thereof is intended to be sold, or is sold, for use outside of the State of Illinois.

This Affiant further states that he is informed and believes, and so states the fact to be, that none of the milk handled and processed by said defendant is directly or indirectly in the current of interstate commerce, and affiant states that no portion of the milk handled by said defendant prior to its ultimate disposition by the defendant is physically and inextricably in anywise intermingled in the processing plant of said defendant with milk which has crossed State lines.

This Affiant denies that the failure to comply with the provisions of the order on the part of the defendant would deprive the producers in the market of money which is rightfully theirs, but on the contrary thereof this affiant states as he is informed and believes that said producers so engaged in interstate commerce would not be entitled to any contribution from said defendant; that the enforcement of said order against said defendant would result in great and irreparable damages to this defendant in compelling it to comply with said order and paying sums of money to others who are not legally entitled thereto; that he is informed and believes that an open price market cannot itself be regarded as a burden on interstate commerce to justify price regulation to relieve a supposed burden, and that artificial price fixing tends to affect the free flow of commerce and would be a burden rather than free com-

petition which now exists in intrastate business in the State of Illinois.

This Affiant further states that he is informed and believes, and so states the fact to be, that over sixty per
54 cent (60%) of all of the milk handled in the Chicago area is produced and sold in the State of Illinois, and that only a small portion of the milk, constituting less than forty per cent (40%) is imported into the State of Illinois, and that said milk so imported constitutes but a small portion of all of the milk consumed in the Chicago area; that the handling of milk in said Chicago area is now controlled by various Ordinances passed by the various municipalities in said Chicago area, and is under their control and that of the State of Illinois, and, therefore, this affiant states, upon information and belief, that there is no substantial current of interstate commerce in the milk area at Chicago, Illinois, as the local shipment of milk from the producers within the State of Illinois to the consumers within the State of Illinois constitutes intrastate commerce, and the small portion imported is merely incidental thereto.

This Affiant further states that he is informed and believes that the purpose of the order issued by the Secretary of Agriculture of the United States, pursuant to the provisions of Title I of said Act, and referred to in the complaint filed in said cause, has for its purpose the maintenance of prices to farmers above the level of which it is declared to be the power of Congress to establish in Subsection 1 of Section 2 of said Agricultural Marketing Agreement Act of 1937; that said order recites that the Secretary has found and proclaimed the period August, 1919-July, 1929, to be the base period to be used in determining the purchasing power of milk sold in the Chicago marketing area; that this affiant is informed and believes that the Secretary of State has available statistics of the Department of Agriculture showing the purchasing power during the base period designated in Sub-section 1 of Section
55 2 of said Act being the pre-war period August, 1909-July, 1914, or some portions thereof, but that said order issued by said Secretary of Agriculture of the United States arbitrarily employs the period August, 1919-July, 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois, marketing area.

This Affiant Further States upon information and belief

that said order is intended to maintain prices to farmers above the level of the pre-war period, August, 1909-July, 1914, as contrary to the provisions of Sub-section 2 of Section 2 of said Marketing Agreement Act of 1937; that he is informed and believes and so states the fact to be that the highest price paid to farmers for milk during the pre-war period from August, 1909-July, 1914, did not exceed the sum of One Dollar and Ninety-five Cents ($1.95) per hundred pounds, whereas the price paid to farmers, as this affiant is informed and believes, during the post-war period, August, 1919-July, 1929, greatly exceeds said prices theretofore paid during the pre-war period, as will appear more fully from a reprint from the August 1936 issue of "Pure Milk", the official publication of the Pure Milk Association of Chicago, Illinois, and a chart prepared by L. D. Oranger, which is hereto attached as Exhibit A and made a part hereof, and similar testimony by Dr. Roland W. Bartlett, Professor of the School of Agricultural Economics at the University of Illinois, who testified as follows at the hearing in the matter of the proposed marketing agreement and proposed order, which said record is in the possession of the plaintiff:

"In the Chicago market from 1907 to 1919, the country plant price received by dairymen averaged $1.19 per
56 100 pounds of 3.5 per cent milk and the condensery price, $1.90. Since 1919, producers have received a premium above the condensery price. From 1920 to 1929, this averaged 38 cents per 100 pounds. From 1933 to 1937, the premium again averaged 38 cents per 100 pounds, though both series of prices were at a considerably lower level than in 1920-29."

This Affiant further states that he is informed and believes that at this hearing various exhibits were offered and received in evidence by the Secretary of Agriculture of the United States showing the level of price paid to producers during the pre-war period and post-war period, but that this affiant is advised that said exhibits have been sent to Washington and are now in the possession of the Secretary of Agriculture.

And further affiant sayeth not.

Joseph Sawa.

Subscribed and sworn to before me this 23 day of January, A. D. 1940.

Helen M. Schnetzler,
Notary Public.

(Seal)

57 (Reprint from August 1936 Issue of Pure Milk)

Pure Milk

A Monthly Devoted to

Dairy Interests of the Chicago Milk Shed

Official Publication of

Pure Milk Association, Ohicago, Illinois

Chicago, Ill. August, 1936

Volume 9 Number 8

Association Survey Tells 30 Year History of Cooperative Milk Marketing in Chicago Shed.

Price Relationships Subject of Study.

PMA Only Milk Co-op to Survive in Three Decades; Market History Gives Reasons Why.

By Special Request the following article appearing in the August issue has been reprinted in this form. Address all applications for further copies to the Public Relations Department, Pure Milk Association, 608 S. Dearborn Street, Chicago, Illinois.

Editor's Note:

The relationship between the prices paid dairy farmers for their milk and the retail prices that milk consumers pay has caused considerable controversy in the Chicago milk shed for the past thirty years. Especially since payment to the dairy farmer is based upon a price per hundred pounds of milk, while milk consumers purchase milk largely upon a basis of quarts and pints.

(One hundred pounds of fluid milk are equal to 46.5 quarts of milk.)

Another moot subject has been "how large a price advantage should dairy farmers receive for fluid milk—milk that is sold retail in bottles—over milk that is used to make condensed milk, and milk that is used to make butter.

(For many years, sanitary restrictions governing the production of milk have become increasingly rigid, until today the dairy farmers must make larger cash outlays for equipment, barn and milk house construction, labor, steriliz-

ing materials, etc., before City Health Departments will permit such milk to be sold in bottles for human consumption.

While the dairy farmer has willingly accepted these obligations, this has made the cost of producing such milk more than that which is used to make condensed milk and butter—hence, the controversy.)

To achieve a better understanding of price movements and market conditions in the Chicago milk shed on the part of the dairy farmer, the milk distributor, and the milk consumer. Lowell D. Oranger, of the marketing department of the Pure Milk Association has made a study of the above relationships, and has charted price movements for fluid milk, condensed milk, and the butterfat value of fluid milk per hundred pounds from January 1, 1907 to August 1, 1936.

(Butterfat is the basis upon which milk is purchased from dairy farmers to make butter. The price paid dairy farmers per hundred pounds of milk for "butterfat" is 3½ times 92-score Chicago butter on the wholesale market.)

Since 1887 there have been various types of "Farmers' Cooperative Organizations" in the Chicago milk shed, which had for their basic objective some method of collective milk bargaining in order to secure the highest possible price for milk to their members.

Records to chart the progress made by these different dairy farmer organizations are available since January 1, 1907.

However, we do know that the first organization was founded in 1887, being known as the Milk Shippers Union of the Northwest. In 1891 a joint stock company incorporated as the Milk Shippers Association was formed, but was declared illegal in 1895.

Milk Shippers Association.

In 1907 we find that an organization called the Milk Shippers Association operated in the Chicago milk shed, the records showing that it had been in existence since 1897. The purposes of this association were to work out reasonable regulations covering can shipments of milk with the railroads, and to check against the dishonest practices of some milk distributors who were purchasing milk from the dairy farmers at that time. The Association also sought to

have the price of milk paid to the dairy farmers, and any regulation governing the railroad shipment of such milk, decided upon before delivery.

However, at that time the Milk Shippers Association only suggested the prices that should be paid. It was up to each member dairy farmer to sell his milk individually, and to get as near the suggested price as possible from the distributor to whom he was shipping.

T. B. Tested Milk—1908.

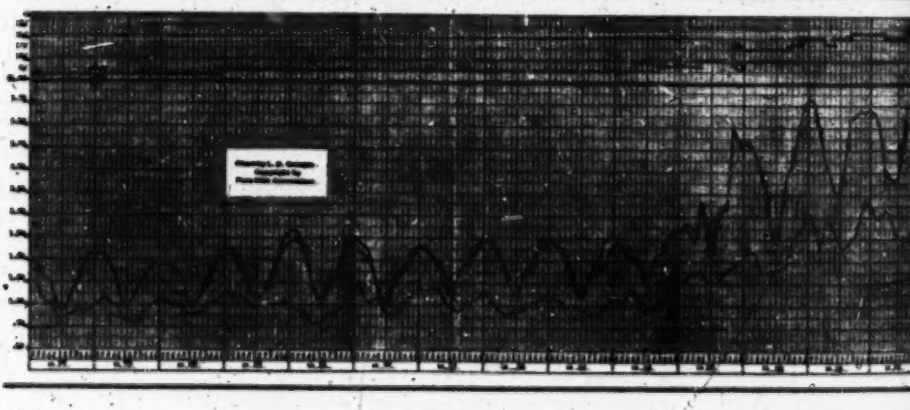
In 1908 an ordinance was passed by the City of Chicago requiring that all cows furnishing milk for the city be tested for tuberculosis. As a result of this ordinance, the Milk Shippers Association dwindled out of existence.

In its place, a new organization known as the Chicago Milk Producers Association appeared in 1909. This Association had as one of its purposes the opposition to the tuberculosis test requirements of the new ordinance. This Association met twice a year to sell its milk, usually in May and November.

This organization did not know how much milk it had to sell. No contracts were made with distributors, and their price—based upon supply and demand—fluctuated closely with butterfat and condensed prices. No means of controlling production was used, save that of allowing the
58 price of milk to increase or decrease as the demand warranted.

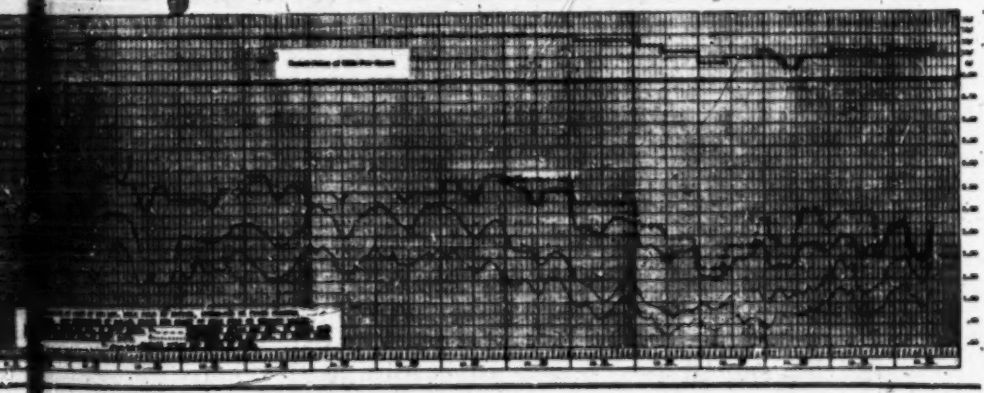
(REPRINT)

STORY OF OVER 30 YEARS OF CO-OPERATIVE



(REPRINT)
August, 1936 PURE MILK Page 3

MARKETING TOLD BY CHART, MARKET SURVEY



Fluid Price Equals Condensary.

By referring to the above chart, you will note that during this period the price paid for fluid milk on the Chicago market was practically the same as that paid by condensaries. In some instance, you will note that the price paid for fluid milk was below the condensed price.

When the supply was the shortest—and during the hot times of the year—the price went up. During the spring and early summer, when production was seasonally high, the price dropped—in some cases almost down to the butterfat price.

With such a sales policy, the milk distributor could take all the milk he needed for his fluid trade and dispose of the excess through manufacturing channels.

Pasturization Required.

The Chicago Milk Producers Association was successful in securing state legislation which automatically set aside the Tuberculin Ordinance. In place of this requirement, the Chicago Board of Health passed an ordinance that all milk not coming from tuberculin tested cows be pasteurized.

All during this period the price paid dairy farmers for all the milk they produced was placed just high enough to secure milk going to condensaries for the fluid market when needed. When such milk was not needed the price for the fluid market would drop, and the "extra" milk would again go to the condensaries. (Note Chart.)

Condensaries Move Out.

As the condensaries moved towards the outer fringe of the milk shed, and away from the "close-in" territory, the "distressed milk" which had been going to the condensaries when the plants were nearer the fluid market began to undermine the fluid market.

("Distressed milk" is milk that cannot find a fluid market, and therefore must be used in manufacturing channels.)

During the World War the prices of condensed milk began to climb. (Note Chart.) The huge demand sent condensed milk prices skyrocketing, and milk distributors were forced to pay a few cents over the condensed milk price to keep it in the fluid milk channels.

The Association membership increased to four times its previous size on account of the high prices.

Dairy Product Demand Drops.

With the end of the World War, the demand for all dairy products dropped. The large volume of milk being produced by the Chicago Milk Producers' Association caused much trouble, the members bickering over sales policy in disposing of the "distressed milk." One group advocated providing Association-owned outlets for such milk, while the other group thought it best to bargain for the "best price."

The organization was not active long after this division of opinion, although its structual set up was maintained.

In November, 1918, we find a new organization called the Milk Producers Cooperative Marketing Company. This company's purpose was to stabilize the fluid milk prices for milk by marketing and manufacturing the members' milk which was produced in excess of that used for fluid consumption.

New Co-op Buys Plants.

In following this program, many manufacturing plants were acquired, and a large membership was enrolled. The organization felt in 1920, when the butter and condensed prices began to fall (Note Chart) that it could maintain such prices because of their many plants to take care of the excess milk.

However, several milk distributors refused to purchase milk from the Company and went further away from Chicago to secure their supply of milk. Such action resulted in the surplus plants being overloaded with milk. In addition, some of the condensaries purchasing milk from the Company refused to continue, as they were able to secure milk from other dairy farmers at a lower price.

In Trouble.

The Marketing Company was then forced to sell or manufacture about 12½ per cent of its volume into butter at a tremendous loss, such action causing large assessments to be made upon the dairy farmer members. An internal

fight, in which four separate faction participated, brought chaos into the market, and the marketing company went into bankruptcy.

The fluid milk price dropped from a peak of $3.70 per hundred pounds in October (Note Chart) to within 5 cents of the butterfat price in September, 1921. At this time the condensed price was 28 cents more than the fluid milk price.

Another Co-op.

Soon after receivers were appointed to liquidate the Marketing Company, the Milk Producers' Association again became active. The purpose of this organization was to bargain a price for all the milk produced by the dairy farmers whom the association represented.

It was not until the latter part of 1920 that very much difference between the fluid milk price and the condensed milk price existed. During that year the whole milk price averaged 23 cents per hundred pounds higher than the condensed price for the same period. In 1921 this difference averaged 22 cents, and in 1922 averaged 18 cents.

During the fall of 1925 the Chicago Board of Health again passed the ordinance requiring milk to come from healthy cows for Chicago consumption effective April 1, 1926. As a result, the policy of the Producers Association became divided. Some were willing to comply and some were not.

PMA Organized.

Those men who wished to comply and produce milk from cows free from Tuberculosis formed the present Pure Milk Association in January, 1926. Besides compliance with the rules and regulations of the cities where Pure Milk Association sold its milk, the association also had control of production as one of its fundamental purposes.

It was felt that under a control plan the dairy farmers who produced an even supply of milk the year around would receive a higher price than if they had an uneven yearly production at the mercy of a highly fluctuating market.

Just after securing distributor recognition in 1929, the Depression set in. The condensary price began to drop considerably. (Note Chart for 1929 and 1930.) However,

the PMA maintained its fluid milk price. You will
59 notice that the spread between the fluid milk base price and condensary varied from 27 cents in January, 1929, until in June, 1931, it rose to $1.30 per hundred pounds.

Beginning January 1, 1931, many price cuts were taken by producers to meet the drop in the purchasing power of the milk consumers. It will be noticed that the Butter and Condensed Prices Dropped Considerably Faster than the Fluid Milk Price during that period.

Because the Pure Milk Association held such a wide spread for fluid base milk over the price paid for condensed milk, milk from the condensary market entered in competition for the fluid market at a considerably lower price than that maintained by the Pure Milk Association.

This independent milk was bought by distributors buying from the PMA, and as a result those that still purchased from the Association faced a highly competitive situation. Had the Association and the unorganized dairy farmers who entered the fluid market worked more closely together, such a situation might have been avoided. At least competitive conditions might have been eased. (Note effect on price from 1931 to present time.)

Conditions Improving.

At the present time, market conditions are improving. The purchasing power of the consuming public is increasing, and we find that the butter and condensed milk prices are beginning to go upward.

One point that might be noted carefully is: that while Pure Milk Association was slow to lower its price spread in relation to the condensary price, its price is rising faster in relation to the condensed price than during the early part of the Depression.

Rigid sanitary requirements will no doubt have an effect upon the market situation in the near future. Chicago's recent passed Grade A milk ordinance has required more in the way of labor and expense to the dairy farmer, and will no doubt influence market conditions. While the Grade A ordinance applies only to fluid milk, cream and ice cream at the present time, it is expected in the future that regulations affecting the production of milk used for condensed and butter-making purposes will be put in effect.

A study of the above chart, and conclusions based upon the article herein presented offers some interesting facts concerning the thirty-year history of cooperative milk marketing by dairy farmers in the Chicago milk shed.

They are:

1. That of the five cooperative milk marketing companies operating from 1907 to the present time, two went out of existence because of dairy farmer opposition to Health Department ordinances which were put in effect in spite of their opposition.

Another Association organized by the dairy farmers to fight the Tuberculin test ordinance was broken up finally by internal dissention. A fourth organization dissolved because of an unwise price program. The last formed organization, the Pure Milk Association, is still operating and is in a strong financial condition.

The Pure Milk Association is the only one of the five organizations to start out with a production control program, and to have as one of its major purposes compliance with rules and regulations of the City Health Departments where it sells its member's milk.

2. The Pure Milk Association, since it became a strong market factor in 1929 is the only milk marketing organization to maintain a consistant fluid milk spread over the condensary price, this varying from 27 cents over condensary in January, 1929, to as high as $1.30 over condensary in June, 1931; and 50 cents over condensary at the present time.

3. With the adoption of a production allotment base for each member of the PMA, price fluctuations have been relatively stable despite abnormal market conditions.

4. Abnormally high prices for milk during the World War period, and shortly after, (1917-18-19-20) were caused by the huge demand for dairy products. With armies all over the world being dispersed, the demand for the dairy products dropped sharply, leaving the dairy farmers all over the country with a huge supply of milk on hand. There followed a hectic six years (1920-1926) in which two milk associations broke up and the Pure Milk Association was formed.

5. From 1907 to the Middle of 1920 the Fluid Milk Prices and Condensary Prices Were Practically Equal! (Note Chart where condensary price does not show it is

same as fluid.) In Fact, for Several Months in 1921 the Condensary Price Was More Than the Fluid Milk Price!

6. When the Depression began in 1929, a terrific drop in consumer purchasing power was recorded. Intense competition between organized dairy farmers and the unorganized dairy farmers for distributors grew. Competition between distributors assumed alarming proportions, and it will be noticed that from 1930 to the present time the price of milk has fluctuated violently. (Note Chart.)

The retail price movements, as recorded at the top of the chart, show an interesting tendency to move in seven-year cycles. 1910 to 1916 was a period that held a constant retail price. A corresponding study of market conditions during that period shows price movements in the farmers' market to be relatively steady.

The 1916 to 1923 period was marked by violent fluctuations of the retail price as well as in the farm market. 1923 to 1930 brought fairly steady market prices for farmers, and a constant retail price to milk consumers.

With the depression taking dire effect in 1931 and up to the present time, a period of market fluctuations and retail price changes has existed. It will be interesting to notice at the end of an approximate seven-year cycle whether a period of relative stability will begin. Economic conditions are improving.

7. Indications are that in the Chicago milk shed, rigid sanitary requirements—now only effective and applicable to fluid milk, cream and ice cream—may be made effective where milk for condensed or butter purposes is produced for consumption in Chicago.

8. And last, but not least, if all producers will work closely together in the future, whether they belong to the same organization or not, the above chart will show a continued upward trend of fluid milk prices, especially in relation to the spread between the butter and condensed prices.

60 Prize Winning PMA Essay

"What the Pure Milk Association Has Accomplished for the Milk Producers of the Chicago Milk Shed."

by Arnold Friese, Paletine, Ill.

The Pure Milk Association is a farm organization, composed of milk producers that supply milk for the Chicago

market. It was organized in 1926 with the goal of supplying a higher quality of milk and of providing better market conditions for milk.

The Association has benefited three distinctly important groups: the consumer, the retailer, and the producer.

Through the efforts of the Association, the consumer now has the assurance of knowing that the dairy products he buys are of the highest quality obtainable. The retailer who buys through the Association is assured of an ample supply of milk for the entire year. Naturally, the producer has received the most benefits, as it is an organization of milk producers.

The Association has at present 15,000 members. The Association is divided into 134 locals and 15 districts. All members have a part in the organization, and each is entitled to one vote in the election of local officers and the district director. The directors of the 15 districts are the most important elective officers of the organization, and they direct all the policies of the Association. The organization is operated on a non-profit-making basis.

The accomplishments of the Association have been great and many since its organization in 1926. It assures the producer a market for his milk the entire year with the assurance of receiving his milk check, even though the dealer should fail to pay, for one reason or another. In case a member should be banned from the market because of some contagious disease on his premises, the Association will reimburse him for 75% of his milk for the period he is unable to ship his milk to market.

As a guarantee to the member that he will receive his correct weights and butterfat tests, the Association has employed a group of trained fieldmen who go to the different plants and dairies and constantly check the scales and butterfat tests. It also maintains a field laboratory which gives useful information and new methods in improving the quality of milk to its members. This reduces losses due to rejections of milk.

Through motion pictures, advertising material, posters, and speakers the organization has informed the public of the high quality of milk produced by its members; thereby increasing the consumption of dairy products. The Association also bargains with the dealers in case of disagreement and assures the member a fair price for his product. The members of the Association are also guaranteed a

representation in their respective State Legislatures and Congress. Here the organization does it utmost in having bills introduced and passed that are of benefit to the dairymen and farmers.

Through the Association, the income of the producer has increased materially. This added income made it possible for the producer to make necessary improvements on his buildings and farm; thereby creating a market for factory products.

All these benefits of the Association that have been mentioned have aided greatly in securing the loyalty of its members and creating a strong organization, an organization that is always ready to be of help and service to its members in any way possible.

Entered Feb. 2, 1940.

49 And afterwards, to wit, on the 2nd day of February, 1940, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

50 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1211) * *

Friday, February 2, A. D. 1940.

Present: Hon. Charles E. Woodward, District Judge.

It Is Ordered by the Court that the defendant's motion that the plaintiff furnish a more definite statement of its claim be and the same is hereby allowed in part and disallowed in part and on said motion It Is Ordered by the Court that the plaintiff, on or before February 16, 1940, furnish a more definite statement of its claim as follows:

(1) State the actual number of such producers who, during the month of April, 1939, were engaged in the production of milk for sale in the Chicago, Illinois, marketing area.

(2) State the number of such producers who were requested to, or notified by, the Secretary of Agriculture to vote in the referendum mentioned and described in the order marked Exhibit A and made a part of the complaint.

(3) State separately the number of such producers who

approved or favored and the number of such producers who disapproved and did not favor the proposed marketing agreement upon which they were requested to vote.

(4) State the number of such producers who failed to vote on such referendum.

(5) Set forth a copy of the proposition submitted to a vote of the producers at such referendum.

61 And on, to wit, the 16th day of February, A. D. 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain More Definite Statement of Claim in words and figures following, to wit: Filed Feb. 1940.

62 (Caption)

MORE DEFINITE STATEMENT OF PLAINTIFF'S CLAIM IN ACCORDANCE WITH ORDER OF COURT.

Comes now the United States, by its Attorney, William J. Campbell, United States Attorney for the Northern District of Illinois, Eastern Division, and in response to the order of this court entered on February 2, 1940, in the above-entitled case, in which motion of defendant, Wrightwood Dairy Company, for more definite statement was allowed in part and disallowed in part, makes the following averments:

(1) That the actual number of producers who, during the month of April, 1939, were engaged in the production of milk for sale in the Chicago, Illinois, marketing area is..... 15,695

(2) That the number of such producers who were requested to, or notified by, the Secretary of Agriculture to vote in the referendum mentioned and described in the order marked Exhibit A and made a part of the complaint, is... 15,695

(3) That the number of such producers who approved or favored the proposed marketing agreement upon which they were requested to vote is 11,278

That the number of such producers who disapproved and did not favor the proposed marketing agreement upon which they were requested to vote is 699

63

(4) That the number of producers who failed to vote on such referendum (excluding 269 disqualified ballots) is 3,499

and that the Tentatively Approved Marketing Agreement Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, attached hereto is a copy of the proposition submitted to a vote of the producers in the referendum.

Also attached hereto are a ballot form, copy of letter dated August 19, 1939, signed by the Referendum Agent to all individual milk producers, and copy of a statement entitled "Some Highlights on the Milk Marketing Agreement Program for the Chicago Area", all of which accompanied the proposed agreement, and a letter dated August 19, 1939, signed by the Referendum Agent and addressed to each milk producers' association and a form of ballot sent to each such association.

United States of America,
By William J. Campbell,
William J. Campbell,
United States Attorney,
U. S. Courthouse,
Chicago, Illinois.

Roy D. Keehn, Jr.,
Roy D. Keehn, Jr.,
Assistant United States Attorney.

Mary Connor Myers,
Mary Connor Myers,
Principal Attorney,
Department of Agriculture,
Washington, D. C.

64 Docket No. A-101.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Division of Marketing and Marketing Agreements.

Tentatively Approved Marketing Agreement Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area.

I hereby certify that this document is a true and correct copy of the said marketing agreement as tentatively approved by the Secretary of Agriculture August 18, 1939.

Hearing Clerk,
U. S. Department of Agriculture.

Dated: August 18, 1939.
Washington, D. C.

65 Instructions for Signing Marketing Agreements.

(Please read carefully before signing.)

Handlers of milk who wish to enter into the Marketing Agreement Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area with the Secretary of Agriculture should fill in and sign in accordance with the following instructions:

1. The agreement should be signed in the space provided for the signer's signature and address in Sec. 15 just below the section headed "Signature of parties." The type of business organization which you represent, whether corporation, partnership, or individual, should be indicated with your signature. If your business is organized as a corporation you should be sure to impress the corporate seal at the left of your signature.

2. The record of milk handled during the month of April 1939 should be properly certified as indicated on page 13.

3. The authorization to correct typographical errors on page 14 should be signed.

4. If your business is a corporation the board of directors should pass a resolution, in the form attached to the agreement on page 14 authorizing the signing of this agreement.

5. In the case of partnerships and corporations the agreement should be signed by persons authorized to represent the same, such authorization to be indicated.

When the above procedure has been completed the agreement should be returned to Wm. B. Connor, Room 708, 506 South Wabash Avenue, Chicago, Illinois.

66 Tentatively Approved Marketing Agreement Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area.

Whereas, under the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), the Secretary of Agriculture of the United States is empowered, after due notice of, and opportunity for, hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in such handling of any agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof; and

Whereas, the Secretary, having reason to believe that the execution of a marketing agreement and the issuance of an order with respect to the handling of milk in the Chicago, Illinois, marketing area would tend to effectuate the declared policy of said act, gave, on the 9th day of June, 1939, notice of a public hearing to be held at Chicago, Illinois, which hearing was held on the 26th, 27th, 28th, 29th, and 30th days of June, 1939 on a proposed marketing agreement and a proposed order, and at said time and place conducted a public hearing at which all interested parties were afforded an opportunity to be heard on the proposed marketing agreement and the proposed order; and

Whereas, the parties hereto, in order to effectuate the declared policy of the said act, desire to enter into this marketing agreement,

Now, Therefore, the parties signatory hereto (said parties being the handlers and the Secretary) agree:

Section 1 Definition. (a) Terms. The following terms as used herein shall have the following meanings:

(1) The term "Chicago, Illinois, marketing area," hereinafter called the "Marketing area," means the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe, all in the State of Illinois.

(2) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(3) The term "producer" means any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such plant.

(4) The term "handler" means any person who, on his own behalf or on behalf of others, purchases or receives milk from producers, associations of producers, or other handlers, all, or a portion, of which milk is disposed of as milk or cream in the marketing area; and who, on his own behalf or on behalf of others engages in such
67 handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any cooperative association or handler with respect to the milk of any producer which it causes to be delivered to a plant from which no milk or cream is disposed of in the marketing area, for the account of such cooperative association or handler, and for which such cooperative association or handler collects payments.

(5) The term "market administrator" means the agency which is described in Sec. 2 for the administration hereof.

(6) The term "delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(7) The term "cooperative association" means any cooperative association of producers which the Secretary determines (a) to have its entire activities under the control of its members, and (b) to have and to be exercising full authority in the sale of milk of its members.

(8) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(9) The term "Secretary" means the Secretary of Agriculture of the United States.

Sec. 2 Market administrator. (a) Designation. The agency for the administration hereof shall be a market administrator who shall be a person selected by the Secretary. Such person shall be entitled to such compensation

as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

(b) Powers. The market administrator shall:

(1) Administer the terms and provisions hereof; and

(2) Report to the Secretary complaints of violation of the provisions hereof.

(c) Duties. The market administrator shall:

(1) Within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

(2) Pay, out of the funds provided by Sec. 9, the cost of his bond, his own compensation, and all other expenses necessarily incurred in the maintenance and functioning of his office.

(3) Keep such books and records as will clearly reflect the transactions provided for herein, and surrender the same to his successor or to such other person as the Secretary may designate.

(4) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 4 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to Sec. 3 or (b) made payments pursuant to Sec. 8.

(5) Promptly verify the information contained in the reports submitted by handlers.

Sec. 3 Reports of handlers. (a) Submission of reports. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 7th day after the end of each delivery period (a) the receipts of milk at each plant from producers, (b) the receipts of milk at each plant from handlers, (c) the receipts at each plant of the milk, if any, produced by him, (d) the utilization of all receipts of milk for the delivery period, and (e) the name and address of each new producer.

(2) Within 10 days after the market administrator's request with respect to any producer for whom such information is not in the files of the market administrator and with respect to a period or periods of time designated by the market administrator (a) the name and address, (b) the total pounds of milk delivered, (c) the average

butterfat test of milk delivered, and (d) the number of days upon which deliveries were made.

(3) On or before the 20th day after the end of each delivery period, his producer pay roll, which shall show for each producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of the payment to such producer made pursuant to Sec. 8, and (c) any deductions and charges made by the handler.

(4) On or before the 7th day after the end of each delivery period, the sale or disposition of milk outside the marketing area, pursuant to Sec. 5(c) as follows: (a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the date of such sale or disposition, (d) the point of use, (e) the plant from which such milk is shipped, and (f) such other information with respect thereto as the market administrator may require.

(b) Vertification of report. Each handler shall make available to the market administrator or his agent (1) those records which are necessary for the verification of the information contained in the reports submitted in accordance with this section, and (2) those facilities necessary for the checking of the weighing and sampling of milk and for determining the utilization of milk by the handler.

Sec. 4. Classification of milk. (a) Basis of classification. All milk purchased or received by a handler from producers, associations of producers, and other handlers, including milk produced by him, if any, shall be classified by the market administrator in the classes set forth in paragraph (b) of this section.

(b) Classes of utilization. The classes of utilization of milk shall be as follows:

(1) Class I milk shall be all milk disposed of in the form of fluid milk, and all milk not accounted for as Class II milk or Class III milk.

(2) Class II milk shall be all milk, except skimmed milk, disposed of in the form of flavored milk and flavored milk drinks, all milk used to produce cottage cheese, and all milk used to produce cream which is disposed of in the form of cream (for consumption as cream), ice cream, and ice cream mix.

69 (3) Class III milk shall be all milk used to produce a milk product other than one of those specified in Class II, and all milk accounted for as actual plant

shrinkage, but not to exceed 2 per cent of the total receipts of milk from producers.

(b) Interhandler and nonhandler sales. Milk disposed of by a handler to another handler, and milk disposed of by a handler to a person who is not a handler but who distributes milk or manufactures milk products shall be classified as Class I milk; Provided, That if the selling handler on or before the 7th day after the end of the delivery period furnishes to the market administrator a statement which is signed by the buyer and seller that such milk was disposed of as Class II milk or Class III milk, such milk shall be classified accordingly, subject to verification by the market administrator.

Sec. 5. Minimum prices. (a) Class prices. Except as set forth in paragraph (c) of this section and subject to the location adjustment set forth in paragraph (b) of this section, each handler shall pay, at the time and in the manner set forth in Sec. 8, for milk purchased or received from producers by such handler at any plant, platform, or loading station located not more than 70 miles from the City Hall in Chicago, not less than the following prices:

Class I milk—Add to the price per hundredweight for milk of 3.5 per cent butterfat content computed pursuant to the formula as set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 70 cents per hundredweight for the months of July, August, September, October, and November; 55 cents per hundredweight for the months of December, January, February, March, and April; and 45 cents per hundredweight for the months of May and June: Provided, That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $1.395 per hundredweight.

Class II milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula as set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 32 cents per hundredweight for the months of July, August, September, October, and November; 28 cents per hundredweight for the months of December, January, February, March, and April; and 25 cents per hundredweight for the months of May and June.

Class III milk—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 20 percent; Provided, That in the event Class III milk is used to produce evaporated or condensed milk handlers shall pay a price per hundredweight computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any.

(b) Location adjustments to handlers. With respect to milk purchased or received from producers at a plant, platform, or loading station located more than 70 miles from the City Hall in Chicago which is classified as Class I milk and as Class II milk (and transported to any point within such 70-mile zone), there shall be deducted 2 cents per hundredweight and ½ cent per hundredweight, respectively, for each additional 15 miles or part thereof that such plant, platform, or loading station is located in excess of 70 miles from the City Hall in Chicago.

There shall be no location adjustment to handlers with respect to Class III milk. For the purposes of this paragraph Class I milk shall be considered to be that milk received from producers at plants, platforms, or loading stations located nearest the marketing area from which whole milk is shipped to the marketing area.

(c) Sales outside the marketing area. The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be the price, as ascertained by the market administrator, which is being paid, in the market where such milk is disposed of, for milk of equivalent use: Provided, That in the event such Class I milk is disposed of outside the 70-mile zone from a plant at which milk is received from producers and which is located more than 70 miles from the City Hall in Chicago, such price as ascertained by the market administrator shall be adjusted by an amount equal to the carload freight rate approved by the Interstate Commerce Commission for the movement of milk in 40-quart cans from the shipping point for the plant where such milk is received from producers to the railroad delivery point serving the market where such milk is utilized as Class I milk.

Sec. 6. Application of provisions. (a) Handlers who

are also producers. (1) No provision hereof shall apply to a handler who is also a producer and who purchases or receives no milk from producers or an association of producers, except that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(2) In the case of a handler who is also a producer and who purchases or receives milk from producers or an association of producers, the market administrator, before making the computations set forth in Section 7, shall (a) exclude the milk purchased or received by him in each class from other handlers, (b) exclude from his remaining Class I milk and Class II milk up to but not exceeding 95 percent of the quantity of milk produced and disposed of by him, and (c) exclude from his remaining Class III milk the balance of the milk produced and disposed of by him.

(3) The market administrator, in computing the value of milk for any handler pursuant to Sec. 7, shall consider as Class III milk any milk or cream received in bulk by such handler from a handler who distributes part of his own production. If the receiving handler disposes of such milk or cream for other than Class III purposes, the market administrator shall add to the total value computed pursuant to Sec. 7 the difference between (a) the value of such milk or cream at the Class III price and (b) the value according to its actual usage.

Sec. 7. Determination of uniform prices to producers. (a) Computation of value of milk for each handler. For each delivery period the market administrator shall compute, subject to the provisions of Sec. 6, the value of milk for each handler which was purchased or received from producers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to Sec. 5, and (b) adding together the resulting values of each class.

(b) Computation and announcement of uniform prices. The market administrator shall compute and announce the uniform price per hundredweight of milk for each delivery period in the following manner:

71 (1) Combine into one total the respective values of milk computed pursuant to paragraph (a) of this section, for each handler who made the report pursuant to Sec. 3(a) for such delivery period;

(2) Add the amount of the location differentials applicable pursuant to Sec. 8(g);

(3) Add the amount of cash balance in the producer-settlement fund;

(4) Divide by the total quantity of milk represented in the computations pursuant to paragraph (a) of this section;

(5) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in the producer-settlement fund; and

(6) On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the price of Class I milk, Class II milk, and Class III milk used in such computations.

Sec. 8. Payment for milk. (a) Time and method of payment. On or before the 15th day after the end of each delivery period each handler shall pay each producer, for milk purchased or received during the delivery period, an amount of money representing not less than the total value of such milk, at the uniform price per hundredweight, computed pursuant to Sec. 7(b) and subject to the butterfat differential and location adjustments set forth in this section.

(b) Producer-settlement fund. The market administrator shall establish and maintain a separate fund known as "the producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to paragraphs (c) and (e) and out of which he shall make all payments to handlers pursuant to paragraphs (d) and (e) of this section.

(c) Payments to the producer-settlement fund. On or before the 14th day after the end of each delivery period each handler shall pay to the market administrator the amount by which the total value of the milk purchased or received by him from producers during the delivery period is greater than the amount obtained by multiplying the hundredweight of milk purchased and received from producers by the uniform price.

(d) Payments out of the producer-settlement fund. On or before the 15th day after the end of each delivery period, the market administrator shall pay to each handler for payment to producers the amount, if any, by which the total value of such milk purchased or received from producers by such handler is less than the amount obtained

by multiplying the hundredweight of such milk purchased or received from producers by such handler by the uniform price. If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler who, on the 15th day after the end of each delivery period, has not received the balance of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his payments to producers by not more than the amount of the reduction in payment from the producer-settlement fund.

72 (e) Adjustments of errors in payments. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (c) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer for milk purchased or received by such handler discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

(f) Butterfat differential. If any handler has purchased or received from any producer, during any delivery period, milk having an average butterfat content other than 3.5 percent, such handler, in making the payments pursuant to paragraph (a) of this section to such producer, shall add for each one-tenth of 1 percent of average butterfat content above 3.5 percent not less than, or shall deduct for each one-tenth of 1 percent of average butterfat content below 3.5 percent not more than 4 cents per hundredweight.

(g) Location adjustments to producers. In making payments to producers pursuant to paragraph (a) of this section, handlers shall deduct with respect to all milk pur-

chased or received from producers at a country plant, platform, or loading station located more than 70 miles from the City Hall in Chicago, the amount specified as follows:

Within 70 to 85 miles—	2 cents per hundredweight
Within 86 to 100 miles—	4 cents per hundredweight
Within 101 to 115 miles—	6 cents per hundredweight
Within 116 to 130 miles—	8 cents per hundredweight
Within 131 to 145 miles—	10 cents per hundredweight
Within 146 to 160 miles—	12 cents per hundredweight
Within 161 to 175 miles—	14 cents per hundredweight
For each 15 miles or part thereof beyond 176 miles from the City Hall of Chicago, an additional—	½ cent per hundredweight

Sec. 9. Expense of administration. (a) Payments by handlers. As his pro-rata share of the expense of the administration hereof each handler, except those handlers exempt from the provisions hereof as set forth in Sec. 6(a), shall pay to the market administrator, on or before the 15th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with respect to all milk purchased or received by him during such delivery period from producers, or produced by him, the exact sum to be determined by the market administrator, subject to review by the Secretary: Provided, That each handler which is a cooperative association shall pay such pro-rata share of expense of administration only on that milk of producers actually received at a plant of such cooperative association, or caused to be delivered by such cooperative association to a plant from which no milk or cream is disposed of in the marketing area.

(b) Suits by market administrator. The market administrator may maintain a suit in his own name against any handler for the collection of such handler's pro-rata share of expense set forth in this section.

73 Sec. 10. Marketing services. (a) Marketing service deduction. In making payments to producers pursuant to Sec. 8, each handler, with respect to all milk received from each producer during each delivery period, except as set forth in paragraph (b) of this section, shall deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, such determination to be subject to review by the Secretary,

and shall, on or before the 15th day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator for verification of weights, samples, and tests of milk received from such producers and in providing for market information to such producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk received from, such producers.

(b) Marketing service deductions with respect to members of a producers' cooperative association. In the case of producers for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 8 as may be authorized by such producers, and pay over on or before the 15th day after the end of each delivery period such deductions to the associations rendering such service of which such producers are members.

Sec. 11. Market advisory committee. (a) Subsequent to the effective date hereof, the market administrator may select a representative committee of the industry for purposes (1) of recommendation of amendments to this order, and (2) for conference, counsel, and advice.

Sec. 12. Effective time, suspension, or termination of marketing agreement. (a) Effective time. The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended, or terminated, pursuant to paragraph (b) of this section.

(b) Suspension or termination of marketing agreement. The Secretary may suspend or terminate this agreement or any provision hereof whenever he finds that this agreement or any provision hereof obstructs or does not tend to effectuate the declared policy of the act. This agreement shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

(c) Continuing power and duty of the market administrator. If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such

further acts shall continue notwithstanding such suspension or termination: Provided, That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(1) The market administrator, or such other person as the Secretary may designate, shall (a) continue in such capacity until removed by the Secretary, (b) from time to time account for all receipts and disbursements, and when so directed by the Secretary deliver all funds on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

74 (d) Liquidation after suspension or termination. Upon the suspension or termination of any or all provisions hereof the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

Sec. 13. Liability. (a) Liability of handlers. The liability of the handlers hereunder is several and not joint, and no handler shall be liable for the default of any other handler.

Sec. 14. Counterparts and additional parties. (a) Counterparts of the marketing agreement. This agreement may be executed in multiple counterparts and when one counterpart is signed by the Secretary all such counterparts shall constitute, when taken together, one and the same instrument as if all such signatures were obtained in one original.

(b) Additional parties to marketing agreement. After this agreement first takes effect any handler may become

a party to this agreement if a counterpart thereof is executed by him and delivered to the Secretary. This agreement shall take effect as to such new contracting party at the time such counterpart is delivered to the Secretary, and the benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

Sec. 15. Signature of parties.

In Witness Whereof, the contracting handlers, acting under the provisions of the act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

.....

Signature

By .....

Name Title

Address .....

Attest .....

.....

Date

75 Record of Milk Handled

During the Month of April 1939.

The undersigned certifies that to the best of his knowledge, as shown by his books and records, he handled during the month of April 1939 ..... hundredweight of milk covered by this agreement and marketed within the Chicago, Illinois, marketing area.

.....

Signed

(Seal)

By .....

....., being duly sworn, deposes and says that he has read the foregoing statement by him subscribed and knows the contents thereof and that the same are true and correct to the best of his knowledge and belief.

.....

Notary Public.

76 **Authorization to Correct Typographical Errors to Be Executed by All Signers.**

We, the undersigned, hereby authorize O. M. Reed to consent on our behalf to the correction of any typographical errors which may have been made in the marketing agreement, regulating the handling of milk in the Chicago, Illinois, marketing area..

.....
Firm name

.....
Date

.....
Name Title Seal
(If corporation)

Corporation only.

Certificate of Resolution.

At a duly convened meeting of the board of directors of ..... held at ..... on the ..... day of ..... 1939 the following resolution was adopted:

Resolved, that ..... shall become a party to the marketing agreement regulating the handling of milk in the Chicago, Illinois, marketing area, as read and explained to the meeting, and it is further

Resolved, that ..... (title) and ..... (title) be, and hereby are authorized and directed to sign, execute, and deliver a counterpart of said agreement attached hereto, to the Secretary of Agriculture, together with an authorization naming O. M. Reed to correct typographical errors.

I, ..., secretary of ....., do hereby certify that this is a true and correct copy of a resolution adopted at the above-named meeting, as said resolution appears in the minutes thereof.

.....

.....
Address of firm Seal

And Seal at Signature Line (Sec. 15) in Body of Agreement.

77 **EXHIBIT 6.**

United States Department of Agriculture

Division of Marketing and Marketing Agreements
Room 708, 506 South Wabash Avenue
Chicago, Illinois

Letter to Milk Producers

Aug. 19 1939

Dear Sir:

Enclosed is a copy of the tentatively approved marketing agreement, regulating the handling of milk in the Chicago, Illinois, marketing area, on which a hearing was held by the Secretary of Agriculture at Chicago, Illinois, on June 20 to June 30, 1939.

Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, provides that the Secretary of Agriculture may issue an order, regulating the handling of milk in the Chicago, Illinois, marketing area in the same manner as provided in the enclosed marketing agreement. Such an order cannot be issued unless such issuance is approved by at least two-thirds of the producers who have been engaged in the production of milk for sale in the Chicago, Illinois, marketing area, during the month of April 1939, as evidenced by the votes of the producers who are represented in this referendum.

Also enclosed is a ballot which you are requested to use in casting your vote in the referendum. Please be sure to answer all of the questions on this ballot. Mark the ballot in the square for "yes" or "no", sign and return to me by mail within four days after the date given at the top of this letter, using the enclosed self-addressed envelope which requires no postage.

Sending this ballot places no obligation whatsoever upon you.

Very truly yours,

Wm. B. Connor,
Referendum Agent.

Enclosures.

78

Room 708
506 S. Wabash Avenue
Chicago, Illinois
August 19, 1939.

Gentlemen:

We have been advised by the Acting Chief of the Dairy Section, Agricultural Adjustment Administration, Washington, D. C., that your association has been qualified to vote on behalf of its members in a referendum now being conducted on the issuance of an Order for the Chicago Milk Market.

In accordance therewith, we are enclosing a form of ballot to be used by you in this referendum and your prompt attention will be appreciated. We are also enclosing herewith return addressed, franked envelope for your use in returning this ballot after voting.

Yours very truly,

Wm. B. Connor,
Referendum Agent.

79

EXHIBIT 5.

UNITED STATES DEPARTMENT OF AGRICULTURE

Division of Marketing and Marketing Agreements
Room 708, 506 South Wabash Avenue
Chicago, Illinois

Milk Producer's Ballot

1. To what handler (milk dealer) was your milk delivered in the month of April 1939?

Ans.: 1. Name of dealer .....

2. Location of plant .....

2. Give name of the county and State in which is located the farm where you produced the milk referred to in question 1.

Ans.: .....

3. Do you approve the issuance by the Secretary of Agriculture of an order, regulating the handling of milk in the Chicago, Illinois, marketing area in the same man-

ner as provided in the tentatively approved marketing agreement?

Ans.:

Yes ☐ (Mark in one square with an (x) showing which way you wish to vote.) No ☐

....

(Name) (Can number,) (if any)

.....

(Address

If your signature above is different from the name appearing on the envelope in which this ballot was enclosed, note here the name as it appears on the envelope.

.....

This Ballot Will Be Treated as Confidential Information by the Secretary.

This Ballot Must Be Postmarked on or Before 11:59 P. M., 1939, If It Is To Be Counted in the Referendum.

80 EXHIBIT 7.

Some Highlights on the Milk Marketing Agreement Program for the Chicago Area

Producers of milk for the Chicago, Ill., marketing area are to vote in a referendum to indicate whether they approve the issuance of an order embodying provisions of the marketing agreement tentatively approved by the Secretary of Agriculture for regulating the handling of milk in this area.

Among the steps necessary before the marketing agreement program can go into effect, is a determination that at least two thirds of the producers, by number or by volume of milk, approve the issuance of the order. The referendum among producers is being held for this purpose. Under the Agricultural Marketing Agreement Act of 1937, qualified cooperative associations of producers may vote on behalf of their members if they so choose. Producers who are not members of such cooperatives may vote for themselves. Ballots must be marked and the envelopes postmarked not later than Friday, August 25, 1939.

Up To Producers

Recently in Chicago, Secretary of Agriculture Wallace said, "the Agricultural Marketing Agreement Act provides machinery which can be used by the farmers to help improve marketing conditions. If a Federal milk marketing agreement is placed in effect in Chicago it will be only, after the producers have made it unmistakably plain through a referendum vote that they want to avail themselves of this machinery".

The marketing agreement program now before producers is based on the record of a public hearing held in Chicago last June at the request of dairymen. At this hearing producers, handlers, and consumers appeared to express their views and make suggestions.

Main Provisions

Under the marketing agreement program, milk received by handlers would be classified into three classes according to use. Minimum prices which handlers would be required to pay would be established for each class of milk. A producer-settlement fund would be established to enable producers to receive a uniform price for their milk regardless of the handler to whom the milk was sold or the use made of that milk by the individual handler.

The program would be administered by a market administrator. Handlers would be required to file with the market administrator periodic reports showing among other things their receipts of milk from producers, the use made of this milk, and payments made to producers. These reports would be subject to verification by the market administrator. From the reports of handlers, the market administrator would compute the uniform producer price for milk received by handlers during each delivery period. Handlers would be required to make payments to producers on the basis of the uniform price computed each month by the market administrator.

81

Minimum Prices Fixed

Under the program, the minimum price per hundredweight for each class of milk would be as follows:

Class 1 (fluid milk)—To the evaporated milk price for

the month of the delivery period there would be added 70 cents for the months of July through November, 55 cents for the months of December through April, and 45 cents for May and June.

Class 2 (Milk, except skim milk, used for cottage cheese, flavored milk, and flavored milk drinks, and all milk used for cream, ice cream, and ice cream mix)—To the evaporated milk price for the month of the delivery period there would be added 32 cents for July through November, 28 cents for December through April, and 25 cents for May and June.

Class 3 (Milk used for a milk product other than those in Class 2 and actual plant shrinkage up to 2 percent of total receipts of milk)—3.5 times the average Chicago wholesale price of 92-score butter for the delivery period, plus 20 percent. (If Class 3 milk is used for evaporated or condensed milk, the price for this milk is the evaporated milk price.)

The class prices which handlers would be required to pay apply to milk received at any plant, platform, or loading station located within 70 miles of the City Hall in Chicago. For Class 1 and Class 2 milk received at any point outside the 70-mile distance and shipped to the marketing area, handlers could deduct 2 cents per hundredweight for Class 1 milk and one-half cent per hundredweight for Class 2 milk for each 15 miles in excess of the 70 miles.

A butterfat differential of 4 cents for each one-tenth of one percent above or below 3.5 percent butterfat content is provided.

The cost of administering the program would be borne by handlers who would pay up to 2 cents per hundredweight for this purpose. Provisions is made for rendering producers marketing services such as verifying the accuracy of handlers' weights and tests of milk and supplying market information to producers. For this purpose handlers would deduct and pay to the market administrator an amount not to exceed 3 cents per hundredweight from payments to those producers for whom a cooperative is not actually performing these services. Producers for whom a cooperative is performing these services would be subject to such deduction as they may authorize.

The bulk of the milk in the Chicago marketing area is used by handlers for Class 1 and Class 2 purposes. Had

the marketing agreement program been in effect during July, 1939, Class 1 milk would have cost handlers $1.79 per hundredweight, and Class 2 milk would have cost them $1.41 per hundredweight.

82 EXHIBIT 8.

UNITED STATES DEPARTMENT OF AGRICULTURE

Division of Marketing and Marketing Agreements
Room 708, 506 South Wabash Avenue
Chicago, Illinois

Milk Producers' Association Ballot

1. During the month of April 1939, there were ..... producers who were members of, stockholders in, or under control with, this association and who were engaged in the production of milk for sale in the Chicago, Illinois marketing area, as defined in the tentatively approved marketing agreement for the Chicago, Illinois, marketing area.

2. During the month of April 1939, these producers produced an average of ..... pounds per day which was sold within the Chicago, Illinois, marketing area.

approves

3. This association hereby disapproves the issuance by the Secretary of Agriculture of an order, regulating the handling of milk in the Chicago, Illinois, marketing area in the same manner as provided in the said tentatively approved marketing agreement.

.....
(Name of association)

.....
(Signature of officer)

This ballot must be accompanied by an attested copy of a resolution passed by the board of directors of the association, authorizing the signing and casting of this ballot.

This Ballot Will Be Treated as Confidential Information by the Secretary.

This Ballot Must Be Postmarked on or Before 11:59 P. M., 1939, If It Is To Be Counted in the Referendum.

Filed Apr. 3, 1940.

83 And on, to wit, the 3rd day of April, A. D. 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer and Counterclaim in words and figures following, to wit:

84 * * (Caption) * *

ANSWER AND COUNTERCLAIM OF WRIGHTWOOD DAIRY COMPANY, DEFENDANT, TO THE COMPLAINT, AS AMENDED, OF UNITED STATES OF AMERICA, PLAINTIFF.

For answer to the complaint, as amended, of the plaintiff in the above entitled cause, Wrightwood Dairy Company, a corporation, defendant above named, says:

First Defense.

The Complaint, as amended, fails to state a claim against defendant upon which relief can be granted.

Second Defense.

1. Defendant admits the allegations contained in paragraph 1 of the Complaint.

2. Defendant is without knowledge as to the allegations appearing in paragraphs 2 and 3 of said Complaint and calls for strict proof of each and every of such allegation.

3. Defendant denies that the order in paragraph 4 of said Complaint was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said order have occurred but, on the contrary thereof, defendant alleges, upon information and belief, that the Secretary, amongst other things

85 required by law as a condition precedent, failed to secure the approval or consent of the producers, as required by Section 608c, subparagraph 9. Defendant is without knowledge whether the orders in said paragraph 4 in said Complaint mentioned were published in the Federal Register as therein alleged, and that said order has been continuously in effect from the effective date thereof to and including the date of the filing of this Complaint, and calls for strict proof of each and every of such allegation.

4. Defendant denies the allegations appearing in paragraph 5 of said Complaint.

5. Defendant admits that since and prior to the effective date of the order, it has been engaged continuously in purchasing and receiving milk from producers, associations of producers, or other handlers, all of which milk is disposed of as milk or cream in the marketing area, and further admits that this defendant purchases and for some time past has purchased approximately 30,000 pounds of milk per day from approximately seventy producers located entirely within the State of Illinois, and no part thereof is purchased from any produeer. located outside of the State of Illinois; defendant admits that said milk is processed by said defendant in its plant in Chicago and sold and distributed entirely within the Chicago marketing area within the State of Illinois, and that no portion thereof is intended to be sold or is sold for use outside of the State of Illinois. Defendant denies that such handling of milk by this defendant is in the current of interstate commerce as defined in Section 10(j) of the Act, or directly burdens, obstructs or affects interstate commerce in milk marketed within the area, and further denies that this defendant is a handler of milk as defined in Section 8c(1) of the Act and in Section 941.1(4) of the order and as such is subject to the applicable provisions of the Act and of the order.

86 6. Defendant is without knowledge whether the milk sold and distributed in the area is produced in four states and whether 23% thereof is produced in Wisconsin, approximately 16% is produced in Indiana, and approximately 1% is produced in Michigan, as alleged in paragraph 7, and calls for strict proof of each and every of such allegations. Defendant denies that approximately 40% of all the milk sold and distributed in the area is directly in the current of interstate commerce, and denies that there is any current of interstate commerce in the marketing area, but, on the contrary thereof, that all of the milk sold and distributed in the area had come to rest in the State of Illinois and was sold entirely in intrastate commerce. Defendant has no knowledge as to whether substantial quantities of the milk produced within the State of Illinois, prior to its ultimate disposition by handlers, is physically and inextricably intermingled in the processing plants of handlers with milk which has crossed

state lines, as alleged in paragraph 7 of said Complaint, and calls for strict proof of each and every such allegation. Defendant denies that any portion of the milk handled by this defendant prior to its ultimate disposition by the defendant is physically and inextricably in any wise intermingled in the processing plant of said defendant with milk which has crossed state lines. Defendant denies that unless all milk produced for sale in the area, whether or not physically intermingled, is subject to the same regulation as the milk which has crossed state lines on its way into the area, discrimination will result against the milk which has moved in the current of interstate commerce, as such milk will be unable to compete with unregulated milk in the area, and that such discrimination would lead to unstable and disorderly marketing conditions and prevent the effectuation of the purpose of the Act, as alleged in paragraph 7 of said Complaint.

87 7. This defendant has no knowledge of the allegations appearing in paragraph 8, save what appears from the Complaint, and calls for strict proof of each and every allegation thereof, except that this defendant admits that he has failed and refused to make the required reports by reason of the fact that this defendant believes that he is not subject to the provisions of said order and said order is otherwise illegal and invalid.

8. Defendant is without knowledge as to the regulations appearing in paragraph 9 of said Complaint, save what appears in the order therein referred to, and calls for strict proof of each and every of such allegation; but this defendant denies that the failure to comply with the provisions of the order on the part of the defendant would deprive the producers in the market of money which is rightfully theirs, but, on the contrary thereof, this defendant states that said producers so engaged in interstate commerce would not be entitled to any contribution from this defendant and that the enforcement of said order against this defendant would result in great and irreparable damage to this defendant in compelling it to comply with said order and in paying sums of money to others not legally entitled thereto, and would result in the unlawful taking of the defendant's property without due process of law and without just compensation, in violation of the Fifth Amendment to the United States Constitution, and further states, on information and belief, that

an open price market cannot itself be regarded as a burden on interstate commerce to justify price regulation to relieve a substantial burden, and that artificial price fixing tends to affect the free flow of commerce and would be a burden rather than the free competition which now exists in intrastate business in the State of Illinois.

9. Defendant has no knowledge as to the provisions of said order other than set forth in paragraph 10 of said
88 Complaint and calls for strict proof of each and every of such allegation; and this defendant states that said Order No. 41, purporting to regulate the handling of milk in the Chicago, Illinois marketing area, issued by the Secretary of Agriculture of the United States, is illegal and contrary to the provisions of the various Acts of Congress in said Complaint mentioned and referred, and contrary to the various provisions of the Constitution of the United States, and particularly contrary to the following provisions of the Constitution of the United States: Article I, Section 1; Article I, Section 8; paragraph 18; the Commerce Clause, Article I, Section 8, Clause 3; the Fifth Amendment to the United States Constitution; and the Tenth Amendment to the United States Constitution.

10. Defendant denies the allegations appearing in paragraph 11 of said Complaint.

11. Defendant denies that said Order No. 41 was approved or favored by at least two-thirds of all the producers who during the representative period determined by the Secretary were engaged within the production area in the production for market of the milk, or engaged in the production of milk for sale, in the marketing area, as set forth in the order incorporated in the Complaint.

12. Defendant denies that plaintiff is entitled to the relief, or any part thereof, in said Complaint, as amended, demanded.

Third Defense.

For a third, further, separate and distinct defense to said Complaint, as amended, defendant alleges that the plaintiff is not entitled to any relief because the Acts of Congress under which these proceedings are brought, namely the Acts of Congress under which these proceedings are brought, namely the Act of May 12, 1933 (48 Stat. 31; 7. U. S. C. A.), as amended May 9, 1934 (48 Stat.

672), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June
89 3, 1937 (50 Stat. 246) (the said Act of May 12, 1933, as reenacted and amended) have no application to this defendant; that defendant is engaged entirely in intrastate business in the State of Illinois, purchasing all of its milk from producers located entirely within the State of Illinois, and no part thereof is purchased from any producers located outside of the State of Illinois; that said milk is processed by said defendant in its plant in Chicago, in the State of Illinois, and sold and distributed in the City of Chicago, State of Illinois, and no portion thereof is intended to be sold or is sold for use outside of the State of Illinois; that none of the milk handled and processed by said defendant is directly or indirectly in the current of interstate commerce and no portion of the milk handled by said defendant, prior to its ultimate disposition by the defendant, is physically and inextricably in any wise intermingled in the processing plant of said defendant with milk which has crossed state lines; that the handling of said milk by this defendant does not directly burden, obstruct or affect interstate or foreign commerce in such commodity; that it appears from the records and proceedings of Congress at the time said Acts were enacted and amended that Congress did not intend to include any handler of agricultural products who is engaged solely in intrastate business; that Congress intended, as shown by the reports of committees of the House of Representatives and of the Senate of the United States, in 1935, that the powers to be exercised by the Secretary of Agriculture under said Acts were to be confined within the limitation upon the federal authority over interstate commerce as expressed by the Supreme Court in *Schechter* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570; that the amendments to the Agricultural Adjustment Act made by Congress on August 24, 1935, and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937, would not have been enacted by the United States Senate except upon the express understanding that it was the sense of the Senate that those in charge of the administration of this provision would have no right to issue orders
90 which would take over the government or control or the price fixing or any other phase of the milk sit-

uation where the milk is produced and where it is sold always within the same state, as will appear more fully from the reports of committees and records of proceedings of Congress pertaining to the enactment of said Marketing Adjustment Act of 1933, as amended, and the Agricultural Marketing Agreement Act of 1937, ready to be produced upon the hearing hereof; that this defendant is not a handler within the meaning of Section 608c(1), (7 U. S. C. A. (Title 7)), and that any other construction subjecting this defendant to the provisions of said Acts would constitute and be a violation of the Commerce Clause, Article I, Section 8, Clause 3, and of Article X of the Amendments to the United States Constitution, and render said Acts therefore unconstitutional and void.

Fourth Defense.

For a fourth, further, separate and distinct defense to said Complaint, as amended, defendant alleges that Order No. 41, purporting to regulate the handling of milk in the Chicago, Illinois marketing area, issued by the Secretary of Agriculture of the United States and relied upon by the plaintiff herein, is contrary to and in direct violation of the express provisions and the declared intent of the Agricultural Adjustment Act of 1933, as amended, and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937, mentioned and described in plaintiff's Complaint, and is therefore illegal and void and unenforceable herein.

Defendant shows that in and by the order No. 41, herein sought to be enforced and attached to the Complaint and made a part thereof, it affirmatively appears by way of recital in said order that the Secretary has found and proclaimed the period August 1919—July 1929 to be the base period to be used in determining the purchasing
91 power of milk sold in the Chicago, Illinois marketing area. In Section 941.0, subparagraph 2 of said Order No. 41, the Secretary of Agriculture finds:

"That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market

supply of and demand for such milk, and that the minimum prices set forth in this order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;" Defendant says that it is informed, and so states the fact to be, that the prices which each handler is required to pay to the producer for milk purchased or received from producers by such handlers, as fixed in said Order No. 41, are greatly in excess of the prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection 1 of Section 602 of said Act; that said Order is intended to maintain prices to farmers above the level of the pre-war period, August 1909—July 1914, which is contrary to the provisions of subsection 2 of Section 2 of said Marketing Agreement Act of 1937; that defendant is informed and believes, and so states the fact to be, the average price paid to farmers for milk during the pre-war period from August 1909—July 1914 was less than $1.50 per hundred pounds, whereas the average price paid to farmers, as this defendant is informed and believes, during the post-war period, August 1919—July 1929 was $2.39 per hundred pounds, which greatly exceeds said prices theretofore paid during the pre-war period.

This defendant further shows, in subparagraph 2 of Section 602 of said Agricultural Adjustment Act (7 U. S. C. A. (Title 7)), now in force and effect, it is declared to be the policy of Congress to protect the interest of the consumer by:

"(a) controlling the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture
92 deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets; and

(b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection 1 of this Section."

Defendant further states that the prices fixed in and by said Order No. 41 have for their purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in sub-

section 1 of Section 602 of said Act, and is expressly prohibited and in direct violation of subsection 2 of said Section 602 of said Act (7 U. S. C. A. (Title 7)), and is therefore illegal and void and unenforceable herein.

Fifth Defense.

For a fifth, further, separate and distinct defense to said Complaint, as amended, defendant alleges that said Agricultural Adjustment Act of 1933, and as subsequently amended, and said Agricultural Marketing Agreement Act of 1937, herein relied upon by the plaintiff, is unconstitutional and void in that it delegates to the Secretary of State legislative powers contrary to the provisions of the Constitution of the United States, and particularly Article I, Section 1, and Article I, Section 8, paragraph 18 thereof, and that the Order No. 41 promulgated pursuant to said Acts is therefore void and unenforceable. Defendant shows that in and by said subparagraph 18 of Section 608c of said Acts, Congress delegated to the Secretary of Agriculture the authority to fix such prices to purchasers of milk as he finds in his opinion will reflect the price of feeds, the available supply of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and thereafter as the Secretary finds necessary
93 on account of changed circumstances, he is authorized, after due notice and opportunity for hearing, to make arbitrary adjustments in such prices without limitation; that in and by said provision, the Secretary of Agriculture is permitted, contrary to the express provision of the Constitution of the United States and in utter disregard of the express declaration of the policy of Congress as expressed in subsection 2 of Section 602 of said Act, as amended, and without regard to the interests of the handler of the product and the consumer, to fix high and exorbitant prices of milk to farmers and compel handlers of milk to pay said high and exorbitant prices irrespective of the base period mentioned and provided for in said Acts, and particularly subsection 2 of Section 602 of said Agricultural Adjustment Act, as amended, as aforesaid. Under paragraph 610c of said Act, Congress delegated to the Secretary of Agriculture the unlimited authority, with

the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by said Chapter, and provided that any violation of any regulation so promulgated by the Secretary shall be subject to such penalty, not in excess of $100, as may be provided therein.

That the foregoing provisions and other and different provisions contained in said Acts, relied upon by the plaintiff herein, constitute an unlawful delegation of the legislative power belonging exclusively to Congress, to the Secretary of Agriculture, and the President, to exercise an unfettered discretion to fix whatever prices or to make such laws or regulations as they may in their judgment deem necessary or expedient for the benefit of the farmer, without regard to the constitutional rights of the handlers and the consumers of the products.

Sixth Defense.

For a sixth, further, separate and distinct defense to said Complaint, as amended, defendant alleges that
94 said Order No. 41 is unlawful, void, and contrary to the public policy of the United States in that said order creates, fosters, and provides for an unlawful monopoly, pool, trust, combination, and confederation among producers and handlers of milk, who participate therein, to regulate and fix the price of milk to farmers; that said order purports to fix the minimum prices of milk to producers, which handlers thereof are required to pay for according to classes therein specified, as will appear more fully from the order, made a part of said Complaint, reference thereto being had for greater certainty; that said order is expressly contrary to the provisions of Sections 1 and 2 of an Act of Congress of July 2, 1890 c647, 26 Stat. 209 (15 U. S. C. A. (Title 15, Commerce and Trade)), and Section 13 (15 U. S. C. A. (Title 15, Commerce and Trade)) (October 15, 1914 c. 323, Section 2, 38 Stat. 730) (15 U. S. C. A. (Title 15)), and other Acts of Congress; that the provisions contained in the Agricultural Adjustment Act and Agricultural Marketing Agreement Act, herein relied upon by the plaintiff, to the effect that no agreement or meeting of producers held and no award of agreement approved shall be deemed to be in violation of any of the anti-trust laws of the United States, as provided in Sec-

tions 608b and 671d, are too indefinite and uncertain so as to constitute a valid exemption and be deemed to be valid amendments by Congress to said Sections 1, 2 and 13 (15 U. S. C. A. (Title 15)), aforesaid, and other Acts of Congress prohibiting such illegal combinations, trusts, and monopolies, as aforesaid; that the enforcement of said order against this defendant would subject this defendant to criminal prosecution under Federal Laws prohibiting the engaging in any such combination or conspiracy for the purpose of fixing prices of commodities, and that said Order No. 41 is therefore illegal, void and unenforceable as against this defendant.

Seventh Defense.

For a seventh, further, separate and distinct defense to said Complaint, as amended, defendant alleges that
95 said Order No. 41 is unlawful, void and contrary to the laws of the State of Illinois and the public policy of said state in that said order creates, fosters and provides for an unlawful monopoly, pool, trust, combination, and confederation among producers of milk and handlers thereof who participate therein to regulate and fix the price of milk to farmers; that said order purports to fix the minimum prices of milk to producers, which handlers thereof are required to pay according to classes therein specified, as will more fully appear from the order, made a part of the Complaint, reference thereto being had for greater certainty; that this defendant purchases its milk from producers located entirely within the State of Illinois and that the milk handled by said defendant is processed by this defendant in its plant in Chicago and is sold and distributed within the State of Illinois, and that it is not engaged in any interstate business; that the handling of milk by this defendant is not in the current of interstate commerce and does not directly burden, obstruct or affect interstate commerce, and that this defendant is entirely under the jurisdiction and control and subject to the laws of the State of Illinois, which jurisdiction is expressly reserved to the states under Articles IX and X of the Amendments to the Constitution of the United States.

Defendant further shows that there is now in full force and effect in the State of Illinois a statute duly passed June 11, 1891, in words and figures as follows:

"If any corporation organized under the laws of this or any other state or county, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured,
mined, produced or sold in this state, such corporation,
96 partnership, or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act."

that said Order No. 41 and all acts and agreements in pursuance thereof are in direct violation of said Illinois Law; that if this defendant be compelled to comply with the provisions of said Order No. 41, this defendant, being engaged solely in intrastate commerce and subject to the jurisdiction of the State of Illinois, would immediately become subject to the criminal liability and penalties as in said statute made and provided; that the exemption, if any, contained in the Federal Agricultural Marketing Adjustment Act and the Agricultural Marketing Agreement Act, as to violation of any anti-trust laws of the United States, would not in any wise exempt this defendant or its officers and directors from the penalties and provisions of the laws of the State of Illinois, contrary to the provisions of the Constitution of the United States in such case made and provided.

Eighth Defense.

For an eighth, further, separate and distinct defense to said Complaint, as amended, defendant alleges that said Order No. 41 is unconstitutional, arbitrary, discriminatory, and illegal and contrary to the provisions of the Acts of Congress, and particularly Section 608c(5)(G) (7 U. S. C. A. Title 7), in that by Section 941.1, paragraph (3) thereof, the Secretary of Agriculture arbitrarily defines a producer as follows:

"The term 'producer' means any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator is qualified to be received at such plant";

that in and by said provision only producers whose milk is approved by any health authority, or which the market administrator may deem qualified, are permitted to reap the benefits of said monopolistic prices so fixed in said order, to the arbitrary exclusion of other producers
97 who may desire to and actually do sell milk and milk products for use in the Chicago, Illinois marketing area; that the Acts of Congress pursuant to which said order was supposedly promulgated do not permit or authorize the Secretary of Agriculture, or the market administrator, to confine the operation of the Acts to only such producers as can meet the arbitrary requirements of some health authority wholly disconnected with the Federal government or its agencies, or some market administrator appointed by the Secretary of Agriculture; that said order violates Section 608c(5)G, reading as follows:

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Defendant further alleges that there is no definite method or means or standard provided for determining when any health authority shall approve the plant of any producer for the receiving of milk for sale in the marketing area, or what proof will be deemed satisfactory to the market administrator as to qualify such milk at such plant; that said order illegally delegates legislative authority to any health authority, whether federal, state, municipal, public or private, to approve plants of producers in order to qualify under the terms and provisions of said order and delegates arbitrary legislative powers to the market administrator to determine the producers who shall be permitted to qualify under the Law.

Ninth Defense.

For a ninth, further, separate and distinct defense to said Complaint, as amended, defendant alleges that said Order No. 41 did not become effective and is therefore null and void in that the referendum conducted by the Secretary of Agriculture pursuant to Sections 8c(9) and 8c(19) was not a referendum of all of the producers who
98 during the representative period determined by the Secretary were engaged within the production area specified in such marketing order in a production for market of the commodities specified therein, or who during such representative period were engaged in the production of such commodity for sale in the marketing area specified in such marketing order, or who during such representative period have produced for market the total volume of such commodity produced for market within the production area specified in said order, or who during such representative period have produced all of the volume of such commodities sold within the marketing area specified in such marketing order, but, on the contrary thereof, this defendant states, upon information and belief, that the Secretary of Agriculture, pursuant to the arbitrary and indefinite and uncertain definition of "producer", as set forth in his order, Section 941.1, subparagraph 3, arbitrarily permitted only such producers whom he or some health authority or authorities arbitrarily considered qualified, to vote at such referendum, and defendant states, upon information and belief, that there were other producers who were engaged within the production area in the production for market of the commodity specified therein during the representative period determined by the Secretary, or who during such representative period were engaged in the production of such commodity for sale in the marketing area specified in such order, which were not permitted or requested to and did not participate in said referendum, and that said order was not in fact approved or favored by at least two-thirds of all of the producers, as recited in said Order No. 41 and as required in and by Section 608c(9) of said Acts, as aforesaid.

Tenth Defense.

For a tenth, further, separate and distinct defense to said Complaint, as amended, defendant alleges that said Order No. 41 is unlawful, discriminatory, unreasonable
99 and void and contrary to the provisions and intent of the Agricultural Adjustment Act, as amended and reenacted, in that the Secretary arbitrarily designated in Section 941.1(1) of said order the cities, towns and villages of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe as the "Chicago, Illinois marketing area" and arbitrarily omitted from said marketing area other cities, towns and villages marketing milk under the same or similar circumstances and located in the same county and state adjoining the City of Chicago, or in its immediate vicinity, such as Oak Park, Berwyn, Cicero, Elmwood Park, Maywood, River Forest, Chicago Heights, and others; that in and by Section 608c(11)B of said Acts, Congress intended that in the case of milk and its products, orders issued under said section shall not be limited in their application to the smallest regional production areas or regional marketing areas, or both, as in other cases; that the prices which handlers are compelled to pay producers under Order No. 41 are considerably higher than handlers pay producers for said commodity for sale other than in said marketing area designated by said Order No. 41 in cities, towns and villages in the immediate vicinity of Chicago and said marketing area such as Oak Park, Maywood, and others above mentioned; that handlers of milk engaged in the Chicago, Illinois marketing area who are compelled to comply with Order No. 41 will be discriminated against and be unable to compete with unregulated milk in other adjoining areas under the same or similar conditions and thereby be deprived of their constitutional rights to engage in their lawful occupation in the State of Illinois except at great loss and irreparable damage.

Eleventh Defense.

For an eleventh, further, separate and distinct defense to said Complaint, as amended, the defendant alleges that said Order No. 41 is unenforceable, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of policy of Congress as set forth

in Sections 601 and 602 of said Act as amended; that
100 the prices to be paid to the producers and the general plan of regimentation of the milk industry in the Chicago area as set forth in said Order No. 41 is calculated, as this defendant is informed and believes and so states the fact to be, to disrupt the orderly exchange of commodities in interstate commerce, which will ultimately impair the purchasing power of farmers and destroy the value of the agricultural assets which support the national credit structure, instead of establishing and maintaining an orderly marketing condition for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period. That this defendant is informed that at the time said Order No. 41 became effective, September 1, 1939, the farmers shipped, pursuant to said order, approximately 125,600,142 pounds of milk into the Chicago, Illinois marketing area. That said shipment rapidly increased and in January, 1940 farmers shipped approximately 160,496,358 pounds of milk into said Chicago, Illinois marketing area; that said increase was an increase of about 27% from the amount shipped during the month of September, 1939 and the number of farmers, or producers, shipping to said market had also increased by 6%; that during the month of January, cows normally produce a minimum of milk. That this defendant is informed and believes and so states the fact to be that when said cows come fresh in May and June, Chicago will receive in excess of 200,000,000 pounds of milk a month, which will be 60% more than the amount of milk used during the month of September 1939, which month, as this defendant is informed and believes and so states the fact to be, is the peak consumption month of the year in the Chicago area; that by reason of said attempted enforcement of said Order No. 41, there will be a large milk surplus of milk in the months of May and June, 1940, and a still larger surplus will be created in the months following; that this is due to the natural increase of milk, as aforesaid, to an increase in the number of shippers, and
101 a greater increase in the volume of production due to increase in size of dairy herds, which resulted by reason of the bonus provided for to be paid to the farmer under the federal price fixing scheme as set forth in said Order

No. 41. That with a vast surplus of milk in the market, this defendant is informed and believes and so states the fact to be that thousands of farmers will be unable to find buyers for their milk at the fixed price, with the result that the entire attempted price structure to farmers will fall to the great and irreparable loss of the farmers and the irreparable damage to the handlers, the consumers, and the public at large. That said order, as promulgated by said Secretary of Agriculture, is economically unsound and will not accomplish the declared purposes intended by Congress and therefore is contrary to the provisions of the Acts in such case made and provided, and therefore unreasonable, unenforceable and void.

Counterclaim.

For a further, separate and distinct counterclaim to the cause of action set up in plaintiff's Complaint, as amended, defendant alleges that it is a corporation organized on April 5, 1932 under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois, for the purpose of handling milk and milk products; that in connection with the operation of said business it acquired the premises commonly known as 2942-48 North Ashland Avenue, Chicago, Illinois, together with machinery, equipment, milk routes, and other valuable personal property, of a value in excess of $100,000.00.

Affiant further states that the defendant purchases, and for some time past has purchased, approximately 30,000 pounds of milk per day from approximately seventy producers located entirely within the State of Illinois, and that no part thereof is purchased from any producers located outside of the State of Illinois; that said milk is processed by said defendant in its plant in Chicago and sold and distributed within the State of Illinois;
102 that no portion thereof is intended to be sold or is sold for use outside of the State of Illinois, and that none of the milk handled and processed by this defendant is directly or indirectly in the current of interstate commerce and does not directly burden, obstruct or affect interstate commerce in milk marketed within the Chicago, Illinois marketing area, and that no portion of the milk handled by said defendant prior to its ultimate disposition

by the defendant is physically and inextricably in any wise intermingled in the processing plant of said defendant with milk which has crossed the state lines; that the proceedings instituted by the plaintiff herein, as set forth in the Complaint, is brought to enforce the provisions of Order No. 41, order regulating the handling of milk in the Chicago, Illinois marketing area, issued by the Secretary of Agriculture of the United States on August 28, 1939, effective September 1, 1939, to prevent and restrain the defendant from handling milk in the Chicago, Illinois marketing area except and pursuant to the provisions of said order, which said order is marked Exhibit "A" and attached to said Complaint and made a part thereof, reference thereto being had for greater certainty.

This defendant further shows that said Order No. 41 issued by the Secretary of Agriculture of the United States does not apply to this defendant; that this defendant is not a handler of milk as defined in Section 8c(1) of the Act and in Section 941.1(4) of the order, and is, as such, not subject to the applicable provisions of the Act and of the order. Defendant hereby incorporates and makes a part hereof the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh defenses hereinbefore set forth, and each of them, and alleges that by reason thereof said Acts and said Order No. 41 are not valid and enforceable as against this defendant; that the enforcement of said Order No. 41 against this defendant would result in great and irreparable damage to this defendant in compelling it to comply with said order and paying
103 sums of money to others who are not legally entitled thereto.

Wherefore, defendant prays:

1. Judgment that the Complaint, as amended, of the plaintiff be dismissed with costs to the defendant;

2. That the court issue a permanent injunction preventing and restraining the plaintiff, its officers, agents, attorneys, and employees, and all persons acting in concert with it, from in any wise enforcing said Order No. 41, or any of its provisions, as against this defendant, its officers, directors, agents and employees, or to compel this defendant, its officers, directors, agents and servants to comply with said Order No. 41 or any of its provisions;

3. That this defendant may be granted such other and

further relief as the court may seem meet and proper in the premises.

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street,
Chicago, Illinois,
Randolph 6727,
Pines, Stein & Beber,
Pines, Stein & Beber,
10 South LaSalle Street,
Chicago, Illinois,
Randolph 6727,
Abraham Lepine,
Abraham Lepine,
Attorneys for Defendant.

104 And on, to wit, the 4th day of June, 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to dismiss Counterclaim, in words and figures following, to wit: Filed June 4, 1940.

105 (Caption)

MOTION TO DISMISS COUNTERCLAIM.

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to dismiss the counterclaim filed by the defendant herein for the following reasons:

I.

The said counterclaim fails to state a claim against the plaintiff upon which relief can be granted.

II.

The affirmative relief sought by said counterclaim is unnecessary and improper because the claim therefor rests solely on matters which the defendant has raised by way of defense in its answer.

III.

The counterclaim seeks an injunction restraining the enforcement of the Agricultural Marketing Agreement Act of 1937 upon the ground that the said act and Order No. 41 issued thereunder are repugnant to the Constitution of the United States; and the question thus presented can only be heard and determined by a statutory three-judge court established pursuant to the provisions of the act of August 24, 1937 (50 Stat. 753; 28 U. S. C. A., sec. 380a); whereas, such statutory three-judge court, being a court of limited jurisdiction, would have no jurisdiction to hear and determine the plaintiff's complaint herein; and thus a conflict of jurisdiction results which makes it impossible for the same court to hear both the plaintiff's complaint and the defendants' counterclaim.

William J. Campbell,
William J. Campbell,
United States Attorney,
U. S. Courthouse,
Chicago, Ill.

Mary Connor Myers,
Mary Connor Myers,
Principal Attorney, Solicitor's Office, Department of Agriculture, Washington, D. C.

Filed June 25, 1940.

179 And on, to wit, the 25th day of June, 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice, in words and figures following, to wit:

180 In the District Court of the United States,
* * (Caption—1211) * *

NOTICE.

To: William J. Campbell, United States Attorney, United States Courthouse, Chicago, Illinois:

Please Take Notice that on Tuesday, the 25th day of June, A. D. 1940, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, We shall appear before his Honor, Charles E. Woodward, Judge of the

District Court of the United Statese, in the room usually occupied by him as a courtroom in the United States Courthouse, Chicago, Illinois, or before such other judge as may be sitting in his place and stead, and shall move the court for leave to file an amendment to defendant's answer in the above entitled cause instanter; at which time and place you may appear if you so see fit.

Alvin E. Stein,
Pines, Stein & Beber,
Abraham Lepine,
Attorneys for Defendants.

Received a copy of the foregoing Notice together with copy of amendment to answer therein mentioned, this 24th day of June, A. D. 1940.

William J. Campbell,
Attorney for Plaintiff.

181 And afterwards, to wit, on the 25th day of June, 1940, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered June 25, 1940.

182 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1211) * *

Tuesday, June 25, A. D. 1940.

Present: Hon. Charles E. Woodward, District Judge.

On motion of defendant's attorneys, It Is Ordered that leave be and the same is hereby given defendant to file instanter amendment to its Answer.

125 And on, to wit, the 25th day of June, A. D. 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Amendment to Answer, in words and figures following, to wit:

Filed June 25, 1940.

126 (Caption)

AMENDMENT TO ANSWER OF WRIGHTWOOD DAIRY COMPANY, DEFENDANT, TO THE COMPLAINT, AS AMENDED, OF UNITED STATES OF AMERICA, PLAINTIFF.

Now comes Wrightwood Dairy Company, defendant in the above entitled cause, and by leave of court first had and obtained files this, its amendment to its answer heretofore filed in the above entitled cause to plaintiff's complaint, as amended, by substituting the following paragraph in lieu of paragraph 6 of the Second Defense of said answer on page 3 thereof, as follows:

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that the milk sold and distributed in the area is produced in four states, and that 23% thereof is produced in Wisconsin, approximately 16% is produced in Indiana, and approximately 1% is produced in Michigan, as alleged in paragraph 7 of plaintiff's complaint, and therefore denies said allegations and calls for strict proof of each and every of such allegations. Defendant denies that approximately 40% of all the milk sold and distributed in the area is directly in the current of interstate commerce, and denies that there is any current of interstate commerce in the marketing area, but, on the contrary thereof, that all of the milk sold and distributed in the area had come to rest
127 in the State of Illinois and was sold entirely in intrastate commerce. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that substantial quantities of the milk produced within the State of Illinois, prior to its ultimate disposition by handlers are physically and inextricably intermingled in the processing plants of handlers with milk which has crossed State lines, as alleged in paragraph 7 of said complaint, and therefore denies the same and calls for strict proof of each and every of such allegation. Defendant denies that any portion of the milk handled by this defendant prior to its ultimate disposition by the defendant is physically and inextricably in any wise intermingled in the processing plant of said defendant with milk which has crossed state lines. Defendant denies that unless all milk produced for sale in the area, whether or not physically

intermingled, is subject to the same regulation as the milk which has crossed state lines on its way into the area, discrimination will result against the milk which has moved in the current of interstate commerce, as such milk will be unable to compete with unregulated milk in the area, and that such discrimination would lead to unstable and disorderly marketing conditions and prevent the effectuation of the purpose of the Act, as alleged in paragraph 7 of said complaint.

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street,
Chicago, Illinois,
Randolph 6727,

Pines, Stein & Beber,
Pines, Stein & Beber,
10 South LaSalle Street,
Chicago, Illinois,
Randolph 6727,

Abraham Lepine,
Abraham Lepine,
Attorneys for Defendant.

106 And on, to wit, the 19th day of July, A. D. 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion for Summary Judgment and Affidavits of Herbert H. Erdmann and William B. Connor in support thereof in words and figures following, to wit: Filed July 19, 1940.

107 (Caption)

MOTION FOR SUMMARY JUDGMENT.

Comes now the United States of America, by William J. Campbell, United States Attorney in and for the Northern District of Illinois, Eastern Division, and in accordance with the provisions of Rule 56 of the Rules of Civil Procedure for the District Courts of the United States moves the Court for a summary judgment in favor of the plaintiff in this case—

(1) commanding the defendant, Wrightwood Dairy Company, its agents, attorneys, employees and assigns, to comply fully with all of the provisions of Order No. 41,

Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture of the United States pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, from September 1, 1939, the effective date of said order, to the date of the entry of judgment;

(2) restraining and enjoining said defendant, its agents, attorneys, employees, and assigns from han-
108 dling milk in said area in violation of any of the terms of said Order No. 41;

(3) particularly requiring said defendant, its agents, attorneys, employees, and assigns—

(a) to file with the Market Administrator appointed by the Secretary of Agriculture to administer said Order No. 41, on or before a date to be fixed in said judgment the reports required to be filed by the terms of Section 941.3 of said Order No. 41 covering the delivery periods from the effective date of said order to the date of the entry of judgment herein;

(b) to make payments to producers supplying said area through said Market Administrator, upon demand of said Market Administrator to all sums due under the provisions of Section 941.8 (c) covering the delivery periods from the effective date of said order to the date of judgment herein;

(c) to make payment to said Market Administrator upon demand of defendant's pro rata share of the expense of administering said order from the effective date thereof to the date of the entry of judgment herein, in accordance with the provisions of Section 941.9 of said order;

and plaintiff submits that summary judgment should
109 be entered in this case for the following reasons:

1. Defendant is a handler of milk in the Chicago, Illinois, marketing area (hereinafter referred to as the "area") as is shown by the admissions contained in the first thirteen lines of paragraph 5 of its Answer herein, and by the second and third paragraphs of the affidavit of Joseph Sawa, president of defendant company, filed in opposition to the motion for preliminary injunction herein, and is, therefore, subject to the provisions of the order.

2. Defendant has failed and refused to make reports to the Market Administrator in accordance with the requirements of Section 941.3 of the order, as is admitted in paragraph 7 of the Answer herein and, therefore, has violated said provisions of the order.

3. Defendant has failed and refused to pay its pro rata share of the cost of administering the order, as required by the provisions of Section 941.9 of the order, Aff. Market Administrator, p. 5, and, therefore, has violated said provisions of said order.

4. Defendant's handling of milk in the Chicago milk area is subject to the provisions of Order No. 41, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area (hereinafter referred to as the "order") despite the fact that defendant buys and sells all the milk handled by it within the State of Illinois, because "over 40 per cent. of the milk and 75 per cent. of the cream sold in Chicago comes from points outside of Illinois. It is commingled, sold in competition with and is indistinguishable from the milk and cream which is produced in Illinois." *Lake Valley Farm Products, Inc., et al.* v. *Milk Wagon Drivers' Union, Local 753, et al.*, 108 F. (2d) 436; *United States* v. *Shissler* (1934) 7 F. Supp. 123; Aff. of Otie M. Reed, pp. 8, 9; and it is recognized that the federal authority covers the sales of wholly intrastate milk "as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines." *United States* v. *Rock Royal Co-operative, Inc., et al.*, 307 U. S. 533. Failure of defendant to comply with the order directly affects interstate marketing of milk in the Chicago Area, Aff. of Market Administrator, pp. 4, 5; and federal regulation of defendant's intrastate commerce is essential to protect interstate commerce in milk in the Chicago area and is a lawful exercise of federal control. *Huston & Texas Ry.* v. *United States*, 234 U. S. 342; *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1; *United States* v. *Rock Royal Co-operative, Inc., supra; United States* v. *David Buttrick Company, et al.*, 28 F. Supp. 878; *United States* v. *John Krechting, et al.*, 26 F. Supp. 266; *United States* v. *Fisher Dairy Company*, S. D. Ia., Nov. 29, 1939; *United States* v. *Adler's Creamery, Inc.*, 107 F. (2d) 987 (the last five cases cited involving the same provisions of the Agricultural Marketing Agreement Act of 1937 and orders similar to Order No. 41); *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *Edwards* v. *United States*, 91 F. (2d) 767; *United States* v. *Hudson-Duncan Co.*, 98 F. (2d) 985.

5. The constitutionality of the provisions of the Agri-

cultural Marketing Agreement Act of 1937 was upheld
111 by the Supreme Court in *Rock Royal Co-operative, Inc., supra*, and in *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 538.

6. The order is similar in all important respects to the Boston milk order, the validity of which was established by the decision of the United States Supreme Court in the *Hood Case, supra;* and is similar to the Cincinnati milk order, the validity of which was established by the decision of the United States District Court in *United States* v. *John Krechting, et al., supra;* and the validity of Order No. 41 was recognized by Judge Sullivan of this court when he issued a preliminary injunction in the case of *United States* v. *Lemont Dairy Company* on November 2, 1939.

7. All procedural steps required by the Agricultural Marketing Agreement Act of 1937 were taken prior to the issuance of the order, as stated by the Secretary of Agriculture in the preliminary recitals contained in the order, Aff. Herbert Erdmann, which is attached hereto; and said procedural steps were similar to those taken in connection with the issuance of the Boston milk order attacked and upheld by the Supreme Court in *H. P. Hood & Sons, Inc.* v. *United States, supra.* In addition the order was published in the Federal Register on August 30, 1939, and under the provisions of the Federal Register Act, 44 U. S. C. A. § 307, such publication creates a presumption that it was duly promulgated.

8. Order was approved by more than two-thirds of the producers who, during the representative period, were engaged within the production area in the production of
112 milk for the area, and more than 92 per cent. of those who voted approved the order, Aff. of William B. Connor, Referendum Agent, thereby more than meeting the requirements of Sections 8c (8) and 8c (19) of the Act. (Detailed information covering this point was filed in this case in response to Motion for More Definite Information granted by the court.) The referendum included all producers supplying the area, and the list of said producers was obtained from the health authorities in the area, who constituted the only impartial source of accurate information concerning producers shipping into the area; and said lists contained the names of all producers approved by said authorities, and under local laws no other producers lawfully could ship; therefore, there could have

been no qualified producers who did not vote or have the opportunity to do so, as alleged in the Ninth Defense.

9. The order establishes formulae for determination of minimum prices to be paid by all handlers in the area for different classes of milk, and the prices fixed according to said formulae are not subject to judicial review until defendant has exhausted the administrative remedy created in Section 608c (15) (A) of the Act, *Myers* v. *Bethlehem Corporation*, 303 U. S. 50, 51; *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 F. (2d) 399; and defendant has not made any attempt to show administratively that said prices have not been in accordance with the provisions of the Act, also, to justify judicial review said price formulae must be shown by defendant to be un-
113 supported by any evidence in the public hearing record, *Virginia Railway Co.* v. *United States*, 272 U. S. 658, 663; *Western Paper Maker's Chemical Co., et al.* v. *United States*, 271 U. S. 268, 270, 271; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304, 307; and to have been determined arbitrarily, *Wallace* v. *Hudson-Duncan and Company, supra*; and defendants have not alleged that said price provisions of order are unsupported by evidence. The prices so established in fact were substantially lower than parity prices, Aff. Otie M. Reed, p. 11, rather than above parity as alleged by defendant in its Fourth Defense; and the base period used in determining said prices was selected in strict accordance with the provisions of Sections 2, 608e and 608c (18) of the Act, see recitals and findings of the Secretary on page 2 of the order, *United States* v. *Rock Royal Co-operative, Inc., et al., supra.*

10. The marketing area was not arbitrarily designated, as alleged in the Tenth Defense, for the reason that it was based upon evidence offered during the public hearings that milk sold throughout the area as defined is of a comparable quality and is produced under similar and stringent health regulations, and that all of such area is a contiguous territory and a natural trade area within which the same factors affecting supply and demand for milk operate, Aff. Herbert Erdmann.

11. There is no unlawful delegation of authority to the Secretary of Agriculture, as alleged in the Fifth Defense, in connection with the price-fixing provisions of the Act, particularly Section 8c (18), *United States* v. *Rock Royal Co-operative, Inc., et al., supra.*

114 12. The order does not violate the Sherman Anti-trust Act for the reason that under the Act orders can be issued only by the Secretary, based upon evidence offered during public hearings with the approval of two-thirds or more of the producers supplying the area (Sec. 8c(1), 8c(8)), the handlers having no control over their issuance and no voice in the public hearings greater than that of any other interested party, and the order could not be the result of any combination between producers and handlers, therefore, as alleged in the Sixth Defense. The provisions referred to in said defense, as granting exemptions from the provisions of the Sherman Law have no application to orders, Section 608b having reference to marketing agreements between the Secretary and handlers, and Section 671d having reference to mediation proceedings in markets in which the Secretary has no issued orders. However, Congress may stabilize interstate marketing "by placing the machinery of price-fixing in the hands of public agencies," as it has done by means of the Act, and "may remove the penalties of the Sherman Act as respects" the industry involved, *Sunshine Anthracite Coal Co.* v. *Adkins*, U. S. Sup. Ct., May 20, 1940.

13. The Act and order, being a regulation of interstate commerce, even if it were contrary to any law of the State of Illinois, which they are not, would supersede such State law, *McCulloch* v. *Maryland*, 4 Wheat. 316; and the order, therefore, is not unlawful and void as alleged in the Seventh Defense.

14. The order is not unconstitutional, arbitrary, dis-
115 criminatory, illegal and contrary to the provisions of the Act and particularly Section 608c (5) (G) thereof, as alleged in the Eighth Defense; by reason of the fact that under the terms of the order a producer is one whose milk is qualified to be received at plants approved by the health authorities, *H. P. Hood & Sons, Inc., et al.* v. *United States, supra;* and whether or not producers, other than those recognized as supplying the area should be permitted to ship into the area is immaterial here, defendant's producers, so far as plaintiff knows, all being approved to deliver into the area and those producers not being parties to this case.

15. The statements of defendant contained in paragraphs numbered 2, 3, 6, 7, 8 and 9 of the answer that it has no knowledge of various facts alleged in the complaint in paragraphs numbered 2, 3, 4, 7, 8, 9 and 10, are insuffi-

cient under Rule 8 (b) of the Rules of Civil Procedure, *S. H. Squire* v. *Arthur D. Levan* (E. D. Pa., February 6, 1940) Department of Justice, Decisions on Federal Rules of Civil Procedure, Bulletin No. 64, issued February 6, 1940, pages 7-8; and do not raise any issues of fact, as such denials, fall within "the general rule that the court is not bound to accept statements in pleadings which are, to the common knowledge of all intelligent persons, untrue * * *." *Benjamin Nieman* v. *Bethlehem National Bank* (E. D. Pa., December 8, 1939, Department of Justice, Decisions on Federal Rules of Civil Procedure).

16. The Secretary of Agriculture has made a find-
116 ing, which appears in the order, that the issuance of the order tends to effectuate the declared purpose of the Act, and that finding is not subject to review by this court except upon a clear showing that it was made in an arbitrary and capricious manner and without support of any evidence in the public hearing record, and defendant does not so allege; and if defendant possesses any evidence to support its allegations contained in its Eleventh Defense, the proper course for it to pursue, as is provided in the Act, is to petition the Secretary for modification of the order and to submit the evidence so possessed to the Secretary to justify such modification. Further, the allegations contained in the last eleven lines of said defense on page 17 and the first nine lines on page 18 purport to describe the effect of the order under economic conditions different from those which existed when the order was promulgated. Both the Act and the order contemplate changes in the order from time to time to meet changing market conditions, and said allegations are totally irrelevant at this time.

17. Handlers subject to the order are not discriminated against by virtue of the price provisions of the order, so far as their out-of-the-area sales are concerned, as alleged in the last seven lines of the Tenth Defense, for the reason that out-of-the-area prices under the terms of Section 941.2 (c) of said order are the prevailing prices in such out-of-the-area markets.

18. Except as to the actual amounts of money to be paid by the defendant under the terms of the order, there is no genuine issue as to any material fact. Those actual
117 amounts cannot be computed until defendant files required reports with Market Administrator.

19. The United States Supreme Court, in *United States* v. *Rock Royal Co-operative, Inc., et al., supra,* which arose

out of the New York milk order, held that the United States was entitled to relief of the nature demanded in this case, that is, that defendant furnish to the Market Administrator all of the information and reports required by the order, and that it pay to producers through the Producer-Settlement Fund all money shown by computations based upon said reports to be due producers, and that it pay to the Market Administrator all money due in connection with the various provisions of the order.

In support of this motion the affidavits now on file in this case, heretofore submitted by the Plaintiff in support of its demand for a preliminary injunction are incorporated herein by reference and made a part hereof, and additional affidavits of William B. Connor and Herbert Erdmann are attached hereto.

William J. Campbell,
United States Attorney;
Chicago, Illinois.

Mary Connor Myers,
Principal Attorney, Solicitor's Office, Department of Agriculture, Washington, D. C.

118 AFFIDAVIT OF HERBERT H. ERDMANN.

Herbert H. Erdmann, being duly sworn, deposes and says:

That he is Director of the Economic and Advisory Unit in the office of the Federal Milk Market Administrator for Chicago and has been since November, 1939; that he was graduated from the University of Wisconsin and had five years of graduate work at that university and at Columbia University and that during part of that period he taught economics at Wisconsin; that from 1935 to 1936 he was an economist for the National Resources Committee; that from 1936 to June of 1939 he was Extension Marketing Specialist for the University of Wisconsin and employed as an agricultural economist by the Dairy Section of the Agricultural Adjustment Administration of the Department of Agriculture; from 1934 to 1935 and again from June to November 1939, that he has specialized in milk marketing and has taken an important part in the preparation of federal milk marketing orders issued by the Secretary of Agriculture,

regulating the marketing of milk in eighteen of the principal markets in the country, including Chicago;

That the same procedural steps were taken in the
119 issuance of the Chicago order as were taken in connection with earlier orders, notably the Boston and New York orders, which were attacked and upheld in the United States Supreme Court;

That in connection with the prices established in order No. 41, with regard to which defendant in the instant case contends that the pre-war period should have been used in determining parity prices, there were no statistics available in the Department of Agriculture sufficient to enable the Secretary to determine such prices, and Department of Agriculture statistics, which are the most comprehensive in the country, were specified in the Act; therefore, also in accordance with the Act, the post-war period was used. The prices determined under the order formulae actually were lower than the post-war prices, because existing economic conditions in the area did not justify fixing the post war period prices, all in accordance with Section 8c(18) of the Act;

That the Act provides for changes in price from time to time as conditions in the market change, and after public hearings, or upon petition by a handler which results in hearing by the Secretary during which a dissatisfied handler may submit any evidence he possesses justifying change in the order. Defendant has not filed such petition or offered evidence to sustain its contentions;

That the marketing area as defined in the order includes the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe, all in the State of Illinois, and evidence in the hearing record indicates that such area includes territory
in which milk of a comparable quality is sold. The
120 marketing area originally proposed included all of Cook and DuPage Counties and nine townships in Will County in Illinois, and four townships in Lake County, Indiana. During the public hearing, testimony was offered which eliminated that part of the proposed area lying in Indiana and the territory lying east of Torrence Avenue (U. S. Highway 330) in Cook County, Illinois. Some evidence was introduced that showed that most of the milk sold in the proposed area was labaled Grade A, but it was admitted by the proponents of the order that only the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka

and Glencoe had Grade A health ordinances conforming with the standards of the United States Public Health Service. Testimony further showed that other municipalities either had no ordinances at all, or if they had ordinances on the statute books, they were not recognized as being in conformity with the standards of the United States Public Health Service and in some instances were not being uniformly enforced. Toward the end of the hearing, proponents of the originally proposed order agreed that it would be extremely difficult to administer an order such as originally proposed, that milk of a distinctly lower quality was permitted to be sold in that part of the area eliminated in the final order, and that such milk usually did not and usually could not be expected to command the same price as the better quality sold in the area as finally defined. The order as issued defined an area in which milk of comparable quality is sold, produced under similar and rather stringent health regulations; and all of such area is contiguous and forms a natural trade area within which the same factors affecting supply and demand for milk
121 operate. The evidence described above appears on pages 101-123; 379-382; 384-388; 463; 629 and 630 of the hearing record. On the basis of such testimony the Order therefore provides that any Class I milk which is sold in the territory outside the prescribed sales area by handlers operating under Order No. 41 is priced according to the prevailing prices in such territory

That this affidavit is made in support of plaintiff's motion for summary judgment herein.

Herbert H. Erdmann.

Subscribed and sworn to before me this 3rd day of June, 1940.

J. Howard Kramer,
(Seal) *Notary Public.*

122 AFFIDAVIT OF WILLIAM B. CONNOR.

William B. Connor, being duly sworn, deposes and says:

That he is Senior Administrative Officer, Field Investigation Section, United States Department of Agriculture, and has held that position, and as agent in charge in Chicago since 1933;

That he makes this affidavit in support of plaintiff's Motion for Summary Judgment herein;

That he was designated by the Secretary of Agriculture as Referendum Agent to conduct the producer referendum in conr ction with the issuance of Order No. 41, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area; and that said designation contained detailed instructions as to the manner in which the referendum should be conducted, and that he followed said instructions in every particular, and that the More Definite Statement of Plaintiff's Claim filed herein contains a true statement of the results of said referendum, and the copies of various documents attached are true copies of the ballots and accompanying documents distributed to producers and co-operatives;

123 That in preparation for this referendum, accountants of the Field Investigation Section of the Agricultural Adjustment Administration, under his direction, prepared a list of the names and addresses of all known producers who, during the month of April, 1939, determined by the Secretary of Agriculture to be a representative period, were engaged in the production of milk for sale in the Chicago marketing area, and said list was prepared from the records of the various health authorities in the area, which were known to be the most reliable information available, as under the health regulations milk for use in the area as milk or cream could only be shipped in by producers who qualified to ship into the area by complying with the health regulations; and that said lists were further checked against producer payrolls of handlers of milk in the area, and the records of cooperative associations of producers shipping into the area;

That in addition to the information sent to producers with the ballots, the Referendum Agent ran a legal advertisement of the referendum in the Chicago Daily Tribune and the Chicago Daily News on August 24, 1939, and press releases describing the referendum and its purposes were sent to various newspapers within the production area, and radio explanations of the Marketing Agreement and Order, together with announcements of the closing date of the poll, were given by members of the Federal and State Extension Service;

124 That the combined vote of cooperative associations and non-member producers showed that 77.9% of the total possible vote was returned and that 94% of the total allowed votes were in favor of the Order; that 71.7% of the total possible vote was favorable; that is, if all ballots

which were not returned had been tabulated as opposed to the issuance of the Order, the votes in favor of issuance would still exceed the required 66⅔%.

William B. Connor.

Subscribed and sworn to before me this 1st day of June, 1940.

J. Howard Kramer,
Notary Public.

(Seal)

Filed Sept. 9, 1940.

183 And on, to wit, the 9th day of September, 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice, in words and figures following, to wit:

184 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1211) * *

NOTICE.

To: William J. Campbell
United States Attorney
United States Courthouse
Chicago Illinois

Please Take Notice that on Monday, the 9th day of September, A. D. 1940, at the opening of court in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before his Honor, Charles E. Woodward, Judge of the District Court of the United States, in the room usually occupied by him as a courtroom in the United States Courthouse, Chicago, Illinois, or before such other judge as may be sitting in his place and stead, and shall then and there move the court for leave to file instanter the supplemental answer of the defendant to the complaint of the United States of America, plaintiff, and for a rule upon the plaintiff to reply to the same within a short date to be fixed by the court, and in support of said motion, we shall present the affidavit of Alvin E. Stein; at which time and place you may appear if you so see fit.

Alvin E. Stein,
Pines, Stein & Beber,
Abraham Lepine,
Attorneys for Defendant.

Received a copy of the above Notice together with copy of supplemental answer and affidavit of Alvin E. Stein therein mentioned, this 5th day of September, A. D. 1940.

Wm. J. Campbell—SM
Attorney for Plaintiff.

185 And afterwards, to wit, on the 9th day of September, 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Sept. 9, 1940.

186 In the District Court of the United States.

* * (Caption—1211) * *

Monday, September 9, A. D. 1940.

Present: Hon. Charles E. Woodward, District Judge.

On motion of Defendant's attorneys It Is Ordered that leave be and the same is hereby given defendant to file instanter Supplemental Answer to Complaint. Thereupon the defendant by its attorneys enters its motion for a rule upon the plaintiff to reply thereto within a short date to be fixed by the Court which motion is denied.

128 And on, to wit, the 9th day of September, A. D. 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Supplemental Answer in words and figures following, to wit:

Filed Sept. 9, 1940.

129 (Caption)

SUPPLEMENTAL ANSWER OF WRIGHTWOOD DAIRY COMPANY, DEFENDANT, TO THE COMPLAINT, AS AMENDED, OF UNITED STATES OF AMERICA, PLAINTIFF.

Now comes Wrightwood Dairy Company, a corporation, defendant in the above entitled cause, by its attorneys, and by leave of court first had and obtained, files this, its supplemental answer, being its twelfth separate and additional defense to plaintiff's complaint, as amended, and alleges:

Twelfth Defense.

1. That the plaintiff in and by its complaint, as amended, seeks to enforce the provisions of a certain Order No. 41 regulating the handling of milk in the Chicago, Illinois marketing area, promulgated by the Secretary of Agriculture of the United States on August 28, 1939, effective September 1, 1939, and to prevent and restrain the defendant from handling milk in violation of the provisions of said Order, and to compel said defendant to comply with all the provisions of said Order No. 41, as will appear more fully from the prayer and allegations of said complaint, as amended, now on file in said above entitled cause, reference thereto being had for greater certainty.

2. That the defendant duly filed its answer and counterclaim and amendment thereto in the above entitled cause, reference thereto being had for greater certainty.

130 3. That since the filing of said answer by the defendant in the said cause, the Secretary of Agriculture did, on, to-wit: June 21, 1940 execute and promulgate an order, as amended, to regulate the handling of milk in the Chicago, Illinois area, and declared that said order, as amended, be effective on and after the first day of July, 1940, a copy of which said order is hereto attached, marked Exhibit "A", and made a part hereof.

4. That said last mentioned order, as amended, has been since July 1, 1940, and still is, in full force and effect.

5. That in and by the provisions of said order, effective since July 1, 1940, said Secretary of Agriculture revoked and annulled the provisions of his previous Order

No. 41 regulating the handling of milk in the Chicago, Illinois marketing area, herein sought to be enforced by the plaintiff, and substituted in its place said new and entirely different order for the regulation of the handling of milk.

6. That said order effective since July 1, 1940 inter alia established by its terms a new "Chicago, Illinois marketing area", materially changed the various classes of persons who were subject to its provisions, reclassified milk and milk products, and in other respects materially changed, altered and substituted new and different provisions not contained and materially at variance with the provisions of said Order No. 41.

Wherefore, defendant says that said Order No. 41, herein sought to be enforced, did on July 1, 1940, become and has since then been inoperative, void and unenforceable; that the claim of the plaintiff herein, namely, that this defendant be compelled to comply with all the provisions of said Order No. 41, which is no longer in force and effect, has become a moot claim, and defendant reiterates its prayer for judgment as in its answer, as amended,
131 hereto filed, set forth.

/s/ Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street, Chicago, Illinois,
Randolph 6727.

/s/ Pines, Stein and Beber,
Pines, Stein and Beber,
10 South LaSalle Street, Chicago, Illinois,
Randolph 6727.

/s/ Abraham Lepine,
Abraham Lepine,
Attorneys for Defendant.

132 EXHIBIT "A".

O-41, as amended Issued June 21, 1940

UNITED STATES DEPARTMENT OF AGRICULTURE
Division of Marketing and Marketing Agreements
T. 7, Ch. IX, Code of Fed. Regs.

Marketing Orders—Part 941

Order, as Amended, Regulating the Handling of Mlik in the Chicago, Illinois, Marketing Area[1]

Contents

		Page
Sec. 941.0	Findings	2
941.1	Definitions	2
941.2	Market administrator	3
941.3	Reports of handlers	4
941.4	Classification of milk	5
941.5	Minimum prices	8
941.6	Application of provisions	10
941.7	Determination of uniform prices	11
941.8	Payment for milk	12
941.9	Expense of administration	13
941.10	Marketing services	14
941.11	Market advisory committee	14
941.12	Effective time, suspension, or termination of order	14

Whereas, pursuant to the powers conferred upon the Secretary by Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), the Secretary of Agriculture of the United States tentatively approved, on August 18, 1939, a marketing agreement and issued, effective September 1, 1939, an order, both of which regulate the handling of milk in the Chicago, Illinois, marketing area; and

1. Section 941.0 to and including Section 941.12 issued under the authority contained in 48 Stat. 31 (1933), 7 U. S. C. 601 et seq. (1934); 49 Stat. 750 (1935); 50 Stat. 246 (1937), 7 U. S. C. 601 et seq. (Supp. IV. 1938).

Whereas, the Secretary, having reason to believe that amendments to said tentatively approved marketing agreement and to said order would tend to effectuate the declared policy of said act, gave, on the 14th day of March 1940, notice of a public hearing which was held at Chicago, Illinois, on March 20, 21, 22, and 23, 1940, at which times and place all interested parties were afforded an opportunity to be heard on certain proposed amended provisions of the tentatively approved marketing agreement and of the order; and

Whereas, after such hearing, handlers of more than fifty percent of the volume of milk covered by this order, as amended, which is marketed within the Chicago, Illinois, marketing area, refused or failed to sign a tentatively approved marketing agreement, as amended, relating to the handling of milk in such marketing area; and

Whereas, the requirements of section 8c (9) of said act have been complied with; and

Whereas, the Secretary finds, upon the evidence introduced at the above-mentioned public hearing, said findings being in addition to findings made upon the evidence introduced at the original hearing on said order and being in addition to the other findings and determinations made prior to or at the time of the original issuance of said

2

order (which findings are hereby ratified and affirmed, save only as such findings are in conflict with the findings hereinafter set forth):

Section 941.0 Findings. 1. That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8e of said act, are not reasonable in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market supply of and demand for such milk, and that the minimum prices set forth in this order, as amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

2. That the provisions of the order, as amended, requiring handlers to pay producers, through the producer-settlement fund, the difference between the value of milk

or cream, purchased or received from sources other than producers or other handlers, at the Class IV price and the value according to its actual utilization by the handler, are incidental to and not inconsistent with the other provisions of the order, as amended, and are necessary to effectuate such other provisions;

3. That the order, as amended, regulates the handling of milk in the same manner as and is applicable only to handlers defined in a marketing agreement, as amended, upon which a hearing has been held; and

4. That the issuance of this order, as amended, and all of its terms and conditions, will tend to effectuate the declared policy of the act:

Now, Therefore, H. A. Wallace, Secretary of Agriculture, pursuant to the powers conferred upon him by said act, hereby orders that such handling of milk in the Chicago, Illinois, marketing area, as is in the current of interstate commerce, or as directly burdens, obstructs, or affects interstate commerce, shall, from the effective date hereof, be in compliance with the following terms and conditions:

Sec. 941.1. Definitions. (a) Terms. The following terms as used herein shall have the following meanings:

(1) The term "Chicago, Illinois, marketing area," hereinafter called the "marketing area," means the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

(2) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(3) The term "approved plant" means any plant which is approved by any health authority for the receiving of milk which may be disposed of as Class I milk, as defined in Sec. 941.4, in the marketing area.

(4) The term "producer" means any person who produces milk which is received by a handler at an approved plant, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such approved plant.

(5) The term "handler" means any person who, on his own behalf or on behalf of others, purchases or re-

ceives milk from producers, associations of producers, other handlers, persons producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, all, or a portion, of which milk is disposed of as Class I milk or Class II milk in the marketing area; and who, on his own behalf or on behalf of

others, engages in such handing of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any person who receives milk from producers at an approved plant from which no milk or cream is disposed of in the marketing area, and any cooperative association or handler with respect to the milk of any producer which it causes to be delivered to a plant from which no milk or cream is disposed of in the marketing area, for the account of such cooperative association or handler.

(6) The term "market administrator" means the agency which is described in Sec. 941.2 for the administration hereof.

(7) The term "delivery period" means the current marketing period from the first to the last day of each month, both inclusive.

(8) The term "cooperative association" means any cooperative association of producers which the Secretary determines (a) to have its entire activities under the control of its members, and (b) to have and to be exercising full authority in the sale of milk of its members.

(9) The term "frozen cream" means milk the butterfat from which is held in an approved cold storage warehouse at an average temperature below zero degrees Fahrenheit for 7 consecutive days, as shown by charts of a recording thermometer.

(10) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

(11) The term "Secretary" means the Secretary of Agricultural of the United States.

Sec. 941.2 Market administrator. (a) Selection, Removal, and Bond. The agency for the administration hereof shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The

market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

(b) Compensation. The market administrator shall be entitled to such reasonable compensation as shall be determined by the Secretary.

(c) Powers. The market administrator shall have the power: (1) to administer the terms and provisions hereof, and (2) report to the Secretary complaints of violations of this order.

(d) Duties. The market administrator, in addition to the duties hereinafter described, shall:

(1) Keep such books and records as will clearly reflect the transactions provided for herein;

(2) Submit his books and records to examination by the Secretary at any and all times;

(3) Furnish such information and such verified reports as the Secretary may request;

(4) Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator;

(5) Publicly disclose, after reasonable notice, the name of any person who has not made reports pursuant to Sec. 941.3, or made payments required by Sec. 941.8;

4

(6) Prepare and disseminate, for the benefit of producers, consumers, and handlers, such statistics and information concerning the operation hereof as do not reveal confidential information;

(7) Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof; and

(8) Pay, out of the funds received pursuant to Sec. 941.9, the cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administrator, his own compensation, and all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

(e) Announcement of Prices. The market administrator shall compute and publicly announce prices as follows:

(1) Not later than the 5th day after the end of each delivery period, the prices for all classes of milk pursuant to Sec. 941.5 (a), the differentials pursuant to Sec. 941.5 (b), and the Class I prices applicable pursuant to Sec. 941.5 (d).

(2) Not later than the 14th day after the end of each delivery period, the uniform price computed pursuant to Sec. 941.7 (b).

Sec. 941.3 Reports of handlers. (a) Submission of Reports. Each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, as follows:

(1) On or before the 7th day after the end of each delivery period, each handler who purchases or receives milk from associations of producers and other handlers, with respect to all milk purchased or received from such sources, shall submit to the market administrator and to the association of producers or handlers from whom the milk was purchased, a record of the utilization of such milk, classified pursuant to Sec. 941.4.

(2) On or before the 10th day after the end of each delivery period, the quantity and the butterfat test of (a) the receipts of milk at each plant from producers, (b) the receipts of milk at each plant from other handlers, (c) the receipts of milk or cream from sources other than producers and handlers, if any, (d) the receipts at each plant of the milk produced by him, if any, and (e) the utilization of all receipts of milk for the delivery period.

(3) On or before the 10th day after the end of each delivery period, the information required with respect to producer additions, producer withdrawals, and changes in names of farm operators.

(4) On or before the 10th day after the end of each delivery period, the sale or disposition of milk outside the marketing area, pursuant to Sec. 941.5 (d) as follows: (a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the point of use, (d) the plant from which such milk is shipped, and (e) such other information which respect thereto as the market administrator may require.

(5) On or before the 25th day after the end of each delivery period, his producer pay roll, which shall show for each producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of pay-

ment to such producer made pursuant to Sec. 941.8; (c) any deductions and charges made by the handler, and (d) such other information with respect thereto as the market administrator may require.

134 5

(b) Verification of Reports and Payments. The market administrator shall verify all reports and payments of each handler by audit of such handler's records, and of the records of any other handler or person upon whose disposition of milk such handler claims classification. Each handler shall keep adequate records of receipts and utilization of milk and shall, during the usual hours of business, make available to the market administrator or his representative such records and facilities as will enable the market administrator to:

(1) Verify the receipts and disposition of all milk required to be reported pursuant to this section, and, in case of errors or omissions, ascertain the correct figures;

(2) Weigh, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends; and

(3) Verify the payments to producers prescribed in Sec. 941.8.

Sec. 941.4 Classification of milk. (a) Basis of Classification. All milk purchased or received by a handler from producers, associations of producers, and other handlers, including milk produced by him, if any, and including milk or cream purchased or received from sources other than from producers and handlers, if any, shall be reported by the handler in the classes set forth in paragraph (b) of this section: Provided, That if milk is moved from the plant where first received from producers to the plant of a second handler who has facilities for manufacturing milk products, such milk shall be classified as Class I milk, if moved from the second handler's plant in the form of milk to the plant of another handler, or nonhandler, who distributes fluid milk, and such milk shall be classified as Class II milk if moved from the second handler's plant in the form of cream to the plant of another handler, or nonhandler, who distributes fluid milk. If such milk is moved from the second handler's plant in the form of milk or cream to the plant of another handler, or nonhandler, who does not distribute fluid milk, such milk or cream shall be

reported by such second handler, according to its utilization by the receiving handler or nonhandler, subject to verification by the market administrator: Provided further, That if milk is moved from the plant where first received from producers to the plant of a second handler who does not have facilities for manufacturing milk products, and if such milk is moved from the second handler's plant in the form of milk or cream to the plant of a nonhandler, such milk or cream shall be reported by the second handler according to its utilization by the nonhandler, subject to verification by the market administrator. If such milk is moved to a third handler's plant, such milk shall be classified as Class I milk if moved from the third handler's plant in the form of milk to the plant of another handler, or nonhandler, who distributes fluid milk; and such milk shall be classified as Class II milk if moved from the third handler's plant in the form of cream to the plant of another handler, or nonhandler, who distributes fluid milk. If such milk is moved from the third handler's plant, in the form of milk or cream to the plant of another handler, or nonhandler, who does not distribute fluid milk, such milk or cream shall be reported by such third handler according to its utilization by the receiving handler or nonhandler, subject to verification by the market administrator.

6

(b) Classes of Utilization. Subject to the conditions set forth in paragraph (a) of this section, the classes of utilization of milk shall be as follows:

(1) Class I milk shall be all milk disposed of in the form of fluid milk, except such milk as is used for purposes for which no approval by health authorities in the marketing area is necessary, and all milk not accounted for as Class II milk, Class III milk, or Class IV milk.

(2) Class II milk shall be all milk, except skim milk, disposed of in the form of flavored milk and flavored milk drinks, and all milk, the butterfat from which is disposed of in the form of cream, sweet or sour, cottage cheese, buttermilk, frozen cream, ice cream, and ice cream mix.

(3) Class III milk shall be all milk the butterfat from which is used to produce a milk product other than one of those specified in Class II and Class IV, and all milk disposed of for those purposes for which no approval by health authorities in the marketing area is necessary.

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(4) Class IV milk shall be all milk the butterfat from which is used to produce butter and cheese, except cottage cheese, and all milk accounted for as actual plant shrinkage: Provided, That such plant shrinkage shall not exceed 2 percent of the total receipts of milk from producers. Any handler whose report claimed the original classification of milk in this class shall be liable under the provisions of Sec. 941.8 (g) for the difference between the Class IV and Class II prices for the delivery period in which the Class IV classification was claimed on any such milk, if the butterfat used in the production of butter is subsequently used in the production of ice cream or ice cream mix.

(c) Responsibility of Handlers in Establishing the Classification of Milk. In establishing the classification of milk as required in paragraph (b) of this section, the responsibilities of handlers in establishing the classification of milk received by them shall be as follows:

(1) In establishing the classification of any milk received by a handler from producers, the burden rests upon the handler who receives the milk from producers to account for the milk and to prove to the market administrator that such milk should not be classified as Class I milk.

(2) With respect to milk, or skimmed milk, disposed of to another handler, the burden rests upon the handler who purchased the milk from producers to account for the milk, or skimmed milk, and to prove to the market administrator that such milk, or skimmed milk, should not be classified as Class I milk: Provided, That if verification by the market administrator discloses a higher utilization than that reported pursuant to Sec. 941.3 (a) (1) for milk purchased by a handler from a cooperative association, the market administrator shall notify the purchasing handler and such handler shall pay to such cooperative association, within 5 days after notification by the market administrator, the difference in value of such milk as verified by the market administrator and as reported by such handler pursuant to Sec. 941.3 (a) (1).

(d) Computation of Milk in Each Class. For each delivery period, each handler shall compute, in the manner and on forms prescribed by the market administrator, the amount of milk in each class, as defined in paragraph (b) of this section, as follows:

(1) Determine the total pounds of milk (a) received from producers, (b) produced by him, if any, (c) received from other handlers, if any, (d) received from other sources, if any, and (e) add together the resulting amounts.

(2) Determine the total pounds of butterfat received as follows: (a) multiply the weight of the milk received from producers by its average butterfat test, (b) multiply the weight of the milk produced by him, if any, by its average butterfat test, (c) multiply the weight of the milk received from other handlers, if any, by its average butterfat test, (d) multiply the weight of the milk received from other sources, if any, by its average butterfat test, and (e) add together the resulting amounts.

(3) Determine the total pounds of milk in Class I as follows: (a) convert to quarts the quantity of milk disposed of in the form of milk, except such milk as is used for purposes for which no approval by health authorities in the marketing area is necessary, and multiply by 2.15, (b) multiply the result by the average butterfat test of such milk, and (c) if the quantity of butterfat so computed when added to the pounds of butterfat in Class II milk, Class III milk, and Class IV milk, computed pursuant to subparagraphs (4) (b), (5) (b), and (6) (c) of this paragraph, is less than the total pounds of butterfat received, computed in accordance with subparagraph (2) of this paragraph, an amount equal to the difference shall be divided by 3.5 percent and added to the quantity of milk determined pursuant to (a) of this subparagraph.

(4) Determine the total pounds of milk in Class II as follows: (a) multiply the actual weight of each of the several products of Class II milk by its average butterfat test, (b) add together the resulting amounts, and (c) divide the result obtained in (b) of this subparagraph by 3.5 percent.

(5) Determine the total pounds of milk in Class III as follows: (a) multiply the actual weight of each of the several products of Class III milk, including all milk disposed of for those purposes for which no approval by health authorities in the marketing area is necessary, by its average butterfat test, (b) add together the resulting amounts, and (c) divide the result obtained in (b) of this subparagraph by 3.5 percent.

(6) Determine the total pounds of milk in Class IV as

follows: (a) multiply the actual weight of each of the several products of Class IV milk by its average butterfat test, (b) add together the resulting amounts, (c) subtract the total pounds of butterfat in Class I milk, Class II milk, and Class III milk, computed pursuant to subparagraphs (3) (b), (4) (b), and (5) (b) of this paragraph, and the total pounds of butterfat computed pursuant to (b) of this subparagraph, from the total pounds of butterfat computed pursuant to subparagraph (2) of this paragraph, which resulting quantity shall be allowed as plant shrinkage for the purposes of this paragraph (but in no event shall such plant shrinkage allowance exceed 2 percent of the total receipts of butterfat from producers by the handler) and shall be added to the result obtained in (b) of this subparagraph, and (d) divide the result obtained in (c) of this subparagraph by 3.5 percent.

(7) Determine the classification of milk received from producers as follows:

8

(i) Subtract pro rata out of each class the quantity of milk received from the handler's own farm.

(ii) Subtract from the total pounds of milk in each class the total pounds of milk which were received from other handlers and used in such class.

(iii) Subtract from the total pounds of milk in each class the total pounds of milk which were received from sources other than producers and handlers and used in such class.

(iv) Except as set forth in paragraph (e) of this section, the result shall be known as the "net pooled milk" in each class.

(e) Reconciliation of utilization of milk by classes with receipts of milk from producers. (1) If the total utilization of milk in the various classes for any handler, as computed pursuant to paragraph (d) of this section, is less than the receipts of milk from producers, the market administrator shall increase the total pounds of milk in Class IV for such handler by an amount equal to the difference between the receipts of milk from producers and the total utilization of milk by classes for such handler, which result shall be known as the "net pooled milk" in each class.

(2) If the total utilization of milk in the various classes for any handler, as computed pursuant to paragraph (d)

of this section, is greater than the receipts of milk from producers, the market administrator shall decrease the total pounds of milk in Class IV for such handler by an amount equal to the difference between the receipts of milk from producers and the total utilization of milk by classes for such handler, which result shall be known as the "net pooled milk" in each class.

Sec. 941.5 Minimum prices. (a) Class prices. (1) Except as set forth in paragraph (d) of this section and subject to the differentials set forth in paragraphs (b) and (c) of this section, each handler shall pay, at the time and in the manner set forth in Sec. 941.8 for milk purchased or received by such handler at any plant located not more than 70 miles by rail or highway, whichever is the shortest, from the City Hall in Chicago, not less than the prices set forth in this paragraph. Any handler who purchases or receives, during any delivery period, milk from a cooperative association which is also a handler shall, on or before the 15th day after the end of the delivery period, pay such cooperative association in full for such milk at not less than the minimum class prices, with appropriate differentials, applicable pursuant to this section.

(2) Class I milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula set forth in section 1 of Article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto, if any, 70 cents per hundredweight for the months of July, August, September, October, and November; 55 cents per hundredweight for the months of December, January, February, March, and April; and 45 cents per hundredweight for the months of May and June: Provided, That with respect to Class I milk disposed of under a program approved by the Secretary for the sale or disposition of milk to low-income consumers, including persons on relief, the price shall be $1.395 per hundredweight during delivery periods prior to July 1, 1940, and thereafter $1.63 per hundredweight.

136 9

(3) Class II milk—Add to the price per hundredweight for milk of 3.5 percent butterfat content computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by

the Secretary on May 31, 1935, or the last amendment thereto, if any, 32 cents per hundredweight for the months of July, August, September, October, and November; 25 cents per hundredweight for the months of December, January, February, March, and April; and 20 cents per hundredweight for the months of May and June.

(4) Class III milk—The price per hundredweight for milk containing 3.5 percent butterfat during each delivery period shall be the average, computed by the market administrator, of prices, as reported to the United States Department of Agriculture, paid during such delivery period to farmers at each of the evaporated milk plants where milk is purchased for evaporating purposes at places listed in this subparagraph and for which prices are reported, but in no event shall such price be less than the price computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or the last amendment thereto.

Location of evaporated milk plants

Mt. Pleasant, Mich.	Berlin, Wis.
Sparta, Mich.	Richland Center, Wis.
Hudson, Mich.	Oconomowoc, Wis.
Wayland, Mich.	Jefferson, Wis.
Coopersville, Mich.	New Glarus, Wis.
Greenville, Wis.	Belleville, Wis.
Black Creek, Wis.	New London, Wis.
Orfordville, Wis.	Manitowoc, Wis.
Chilton, Wis.	West Bend, Wis.

(5) Class IV milk—Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture for the delivery period during which such milk was received, and add 20 percent.

(6) In the event the marketing agreement for evaporated milk, issued by the Secretary on May 31, 1935, is suspended or terminated, the formula price to be used in determining the price for Class I milk, Class II milk, and Class III milk, in lieu of the formula set forth in section 1 of article VI of the said marketing agreement, shall be calculated by the market administrator as follows: Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market as reported by the United States De-

partment of Agriculture for the delivery period during which such milk was received, and add 30 percent.

(b) Butterfat differential to handlers. If any handler has purchased or received milk from producers containing more or less than 3.5 percent butterfat, such handler shall add or deduct, per hundredweight of milk, for each one-tenth of 1 percent butterfat above or below 3.5 percent, an amount equal to the Class IV price computed pursuant to paragraph (a) of this section, divided by 35.

(c) Location adjustments to handlers. (1) With respect to milk purchased or received from producers at a plant located more than 70 miles by rail or highway, whichever is the shorter, from the City Hall in Chicago, which is

classified as Class I milk or Class II milk, there shall be deducted 2 cents per hundredweight and ½ cent per hundredweight, respectively, for each additional 15 miles or part thereof that such plant is located in excess of 70 miles from the City Hall in Chicago: Provided, That if any handler can prove to the market administrator that the l. c. l. freight rate, approved by the Interstate Commerce Commission, or the State authorities having the power to fix intrastate rail rates, for the movement of cream in 40-quart cans from the shipping point for the plant where such milk is received from producers to the marketing area, is greater than ½ cent per hundredweight of milk, such actual freight rate shall be allowed such handler on Class II milk, but in no case shall such rate exceed ½ cent per hundredweight of milk. There shall be no location adjustment to handlers with respect to Class III milk or Class IV milk.

(2) For purposes of this paragraph, Class I milk shall be considered to be that milk purchased or received from producers at plants located nearest to the marketing area from which whole milk is shipped to the marketing area: Provided, That when actual shipments of milk to the marketing area by any handler are shown to be in excess of such handler's Class I milk, the location adjustments on Class I milk as provided in this section shall be applied to such milk, up to and including 105 percent of such handler's Class I milk. Class II milk shall be considered to be that milk purchased or received from producers at plants located nearest to the marketing area, after accounting for

Class I milk, from which whole milk or cream is shipped to the marketing area.

(d) Sales outside the marketing area. The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be the price, as ascertained by the market administrator, which is being paid in the market where such milk is disposed of, for milk of equivalent use: Provided, That in the event such Class I milk is disposed of outside the 70-mile zone, such price as ascertained by the market administrator shall be adjusted by an amount equal to the carload freight rate approved by the Interstate Commerce Commission for the movement of milk in 40-quart cans from the shipping point for the plant where such milk is received from producers to the railroad delivery point serving the market where such milk is utilized as Class I milk.

Sec. 941.6 Application of provisions. (a) Handlers who are also producers. (1) No provision hereof shall apply to a handler who is also a producer and who purchases or receives no milk from producers or an association of producers, except that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(2) The market administrator, in computing the value of milk for any handler pursuant to Sec. 941.7, shall consider as Class IV milk any milk or cream received in bulk by such handler from a handler who distributes a part of his own production. If the receiving handler disposes of such milk or cream for other than Class IV purposes, such handler shall pay to producers, through the producer-settlement fund, the difference between (a) the value of such milk or cream at the Class IV price and (b) the value according to its actual utilization by the handler.

(b) Payment for Milk Received from Sources Other Than from Producers or Other Handlers. If any handler has purchased or received milk or cream from sources other than producers or other handlers, the market administrator, in computing the value of milk for such handler pursuant to Sec. 941.7, shall consider such milk or cream as Class IV milk. If the receiving handler uses such milk or cream for other than Class IV purposes, such

handler shall pay to producers, through the producer-settlement fund, the difference between (a) the value of such milk or cream at the Class IV price and (b) the value according to its actual utilization by the handler. This provision shall not apply to a handler who purchases or receives milk or cream from sources other than producers or handlers, if such handler can prove to the market administrator that such milk or cream was used for purposes which did not violate any regulations issued by the various health authorities in the marketing area.

(c) Payment for Milk Shown as Inventories of Frozen Cream Held on Effective Date of This Amended Order. If any handler has purchased or received milk from producers, or associations of producers, prior to the effective date of this amended order, the butterfat from which is on hand, on the effective date of this amended order, at a plant in the form of frozen cream, or cream which is subsequently so handled as to be classified as frozen cream, and such butterfat is finally disposed of in the manufacture of a product classified as Class II milk, such handler shall pay to producers, through the producer-settlement fund, the difference between the Class III price in effect for the delivery period during which the milk was received from producers and the price computed as follows: Add 20 cents to the price computed pursuant to the formula set forth in section 1 of article VI of the marketing agreement for evaporated milk, issued by the Secretary on May 31, 1935, for the delivery period during which the milk was received from producers. The market administrator or his representative shall at all times have access to the necessary records to determine the physical presence of the cream and the temperature of the room where stored.

Sec. 941.7. Determination of Uniform Price. (a) Net Pool Obligation of Handlers. Subject to the provisions of Sec. 941.6, the net pool obligation of each handler for milk received from producers during each delivery period shall be a sum of money computed for such delivery period as follows:

(1) Multiply the "net pooled milk" in each class, computed pursuant to Sec. 941.4, by the class price, with appropriate differentials applicable pursuant to Sec. 941.5(b), (c), and (d), and add together the resulting values;

(2) Deduct, if the average butterfat content of all milk received from producers is in excess of 3.5 percent, and

add, if the average butterfat content of all milk received from producers is less than 3.5 percent, the total value of the butterfat differential applicable pursuant to Sec. 941.8(c).

(b) Computation of the Uniform Price. The market administrator shall compute the uniform price per hundredweight of milk for each delivery period in the following manner:

(1) Combine into one total the net pool obligations of all handlers, computed pursuant to paragraph (a) of this section, who made the reports pursuant to Sec. 941.3(a) (2) for such delivery period;

(2) Add the amount of the location differentials applicable pursuant to Sec. 941.8(b);

(3) Add the amount of cash balance in the producer-settlement fund;

(4) Divide the result by the total quantity of net pooled milk of all handlers whose reports are included in this computation; and

(5) Subtract not less than 4 cents nor more than 5 cents to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers. The results shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants located within the 70-mile zone.

Sec. 941.8. Payment for Milk. (a) Time and Method of Payment. On or before the 18th day after the end of each delivery period each handler shall pay each producer, for milk purchased or received during the delivery period, an amount of money representing not less than the total value of such milk, at the uniform price per hundredweight, computed pursuant to Sec. 941.7 (b) and subject to the location adjustments and butterfat differential set forth in this section.

(b) Location Adjustments to Producers. In making payments to producers pursuant to paragraph (a) of this section, handlers shall deduct with respect to all milk purchased or received from producers at a plant located more than 70 miles by rail or highway, whichever is the shortest, from the City Hall in Chicago, the amount specified as follows:

	Cents per cwt.
Within 71 to 85 miles	2
Within 86 to 100 miles	4
Within 101 to 115 miles	6
Within 116 to 130 miles	8
Within 131 to 145 miles	10
Within 146 to 160 miles	12
Within 161 to 175 miles	14

For each 15 miles or part thereof beyond 175 miles from the City Hall in Chicago, an additional ½ cent per cwt.

(c) Butterfat Differential to Producers. The uniform price paid to producers shall be plus or minus, as the case may be, 4 cents per hundredweight for each one-tenth of 1 percent above or below 3.5 percent average butterfat content of milk delivered by any producer during any delivery period.

(d) Producer Settlement Fund. The market administrator shall establish and maintain a separate fund known as "the producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to paragraphs (e) and (g) and out of which he shall make all payments to handlers pursuant to paragraphs (f) and (g) of this section: Provided, That the market administrator shall offset any such payment due to any handler against payments due from such handler. Immediately after computing the uniform price for each delivery period, the market administrator shall compute the amount by which each handler's net pool obligation, including the payments to producers which are required to be made pursuant to Sec. 941.6, is greater or less than the sum obtained by multiplying such handler's net pooled milk by the uniform price and shall enter such amount on each handler's account as such handler's pool debit or pool

credit, as the case may be, and render such handler a transcript of his account.

(e) Payments to the Producer-Settlement Fund. On or before the 16th day after the end of each delivery period each handler shall make full payment to the market administrator of any pool debit balance shown on the account rendered, pursuant to paragraph (d) of this section, for the preceding delivery period.

(f) Payments Out of the Producer-Settlement Fund. On or before the 17th day after the end of each delivery period, the market administrator shall pay to each handler the pool credit balance shown on the account rendered, pursuant to paragraph (d) of this section, if any, for the preceding delivery period, less any unpaid obligations of the handler. If at such time the balance in the producer-settlement fund is insufficient to make all payments pursuant to this paragraph, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available. No handler who, on the 18th day after the end of each delivery period, has not received the balance of the payment due him from the market administrator shall be deemed to be in violation of paragraph (a) of this section if he reduces his total payments uniformly to all producers by not more than the amount of the reduction in payment from the producer-settlement fund.

(g) Adjustments of Errors in Payments. Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to the producer-settlement fund pursuant to paragraph (d) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler, pursuant to paragraph (d) of this section, the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment by a handler to any producer, for milk purchased or received by such handler, discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment to producers next following such disclosure.

Sec. 941.9. Expense of Administration. (a) Payments by Handlers. As his pro-rata share of the expense of the administration hereof each handler, except those handlers exempt from the provisions hereof as set forth in Sec. 941.6 (a), shall pay to the market administrator, on or before the 18th day after the end of each delivery period, a sum not exceeding 2 cents per hundredweight with re-

spect to all milk purchased or received by him during such delivery period from producers, from sources other than producers, or from other handlers, or produced by him, the exact sum to be determined by the market administrator, subject to review by the Secretary: Provided, That each handler which is a cooperative association shall pay such pro-rata share of expense of administration only on that milk of producers actually received at a plant of such cooperative association, or caused to be delivered by such cooperative association to a plant from which no milk or cream is disposed of in the marketing area.

14

(b) Suits by Market Administrator. The market administrator may maintain a suit in his own name against any handler for the collection of such handler's pro-rata share of expense set forth in this section.

Sec. 941.10. Marketing Services. (a) Marketing Service Deduction. In making payments to producers pursuant to Sec. 941.8, each handler, with respect to all milk received from each producer during each delivery period, at a plant not operated by a cooperative association of which such producer is a member, shall, except as set forth in paragraph (b) of this section, deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, such determination to be subject to review by the Secretary, and shall, on or before the 18th day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator for verification of weights, samples, and tests of milk received from such producers and in providing for market information to such producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk received from, such producers.

(b) Marketing Service Deductions with Respect to Members of a Producers' Cooperative Association. In the case of producers whose milk is received at a plant not operated by a cooperative association of which such producers are members and for whom a cooperative association is actually performing the services set forth in paragraph (a)

of this section, each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 941.8 as may be authorized by such producers, and pay over on or before the 18th day after the end of each delivery period such deductions to the associations rendering such service of which such producers are members.

Sec. 941.11. Market Advisory Committee. (a) Subsequent to the effective date hereof, the market administrator may select a representative committee of the industry for purposes (1) of recommendation of amendments to this order, and (2) for conference, counsel, and advice.

Sec. 941.12. Effective Time, Suspension, or Termination of Order. (a) Effective Time. The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended, or terminated, pursuant to paragraph (b) of this section.

(b) Suspension or Termination of Order. The Secretary may suspend or terminate this order or any provision hereof whenever he finds that this order or any provision hereof obstructs or does not tend to effectuate the declared policy of the act. This order shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

(c) Continuing Power and Duty of the Market Administrator. If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market admin-

istrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination: Provided, That any such acts required to be performed by the market administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

(1) The market administrator, or such other person as the Secretary may designate, shall (a) continue in such capacity until removed by the Secretary, (b) from time to time account for all receipts and disbursements, and when

so directed by the Secretary deliver all funds on hand, together with the books and records of the market administrator or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator or such person pursuant thereto.

(d) Liquidation After Suspension or Termination. Upon the suspension or termination of any or all provisions hereof the market administrator, or such person as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid or owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

Now, Therefore, H. A. Wallace, Secretary of Agriculture, acting under the provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, for the purposes and within the limitations therein contained and not otherwise, hereby executes and issues in duplicate this order, as amended, under his hand and the official seal of the Department of Agriculture, in the city of Washington, District of Columbia, on this 21st day of June 1940, and declares this order, as amended, to be effective on and after the 1st day of July 1940.

H. A. Wallace,
Secretary of Agriculture.

(Seal)

Filed Sept. 16, 1940.

142 And on, to wit, the 16th day of September, 1940, came Joseph Sawa by his attorneys and filed in the Clerk's office of said Court, his certain Affidavit in words and figures following, to wit:

143 (Caption)

AFFIDAVIT OF JOSEPH SAWA IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

State of Illinois } ss.
County of Cook }

Joseph Sawa, being first duly sworn, upon oath deposes and says that he is President of the Wrightwood Dairy Company, an Illinois corporation, defendant in the above entitled cause, and that he makes this affidavit in opposition to the motion of plaintiff for summary judgment in the above entitled cause.

Affiant incorporates herein, by reference the affidavit heretofore made by him and filed in the above entitled cause in opposition to the motion for a preliminary injunction.

Affiant further states that during the month of April, 1939 considerable milk and milk products were disposed of in the Chicago, Illinois marketing area for which no approval by health authorities in the marketing area was necessary; and that he is informed and believes and so states the fact to be that there were numerous producers during the month of April, 1939 engaged in the production of milk for sale in the Chicago, Illinois marketing area who sold in said marketing area butter, cheese, condensed milk, evaporated milk, and other products of milk for which no approval by health authorities in the marketing area was necessary, and who did not, on or about August, 1939, or at any other time, receive from William B. Connor, Referendum Agent of the United States Department of Agriculture, Division of Marketing and Marketing Agreements, a copy of the tentatively approved marketing agreement, and did not receive any ballots for use in casting their votes in the referendum, as required by law, and
144 did not receive any other request to vote in said referendum to evidence their approval or disapproval of said tentative marketing agreement as producers engaged

in the production of milk for the Chicago, Illinois marketing area during the month of April, 1939, and who did not cast any ballots in said referendum.

That, as this affiant is informed and believes, and so states the fact to be, said order was not in fact approved and favored by at least two-thirds of all of the producers, as required in and by Section 608c(9) of said Acts of Congress.

Affiant further states that he is informed and believes, and so states the fact to be, that there were numerous producers who, during the month of April, 1939, were engaged in the production of milk and whose plants were approved by health authorities in the Chicago, Illinois marketing area, and who sold milk to the defendant herein, who did not at any time receive from William B. Connor, Referendum Agent of the United States Department of Agriculture, Division of Marketing and Marketing Agreements, a copy of the tentatively approved marketing agreement, and did not receive a ballot for use in casting their vote in the referendum, as required by law, and did not receive any other request to vote in said referendum to evidence their approval or disapproval of said tentative marketing agreement as producers engaged in the production of milk for sale in the Chicago, Illinois marketing area during the month of April, 1939, and that said producers did not cast any ballots in said referendum.

Further affiant sayeth not.

Joseph Sawa,

Subscribed and Sworn To before me this 14 day of September, A. D. 1940.

Anne Blume,
Notary Public.

(Seal)

Filed Sept. 16, 1940.

145 And on, to wit, the 16th day of September, A. D. 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Supplemental Motion for Summary Judgment in words and figures following, to wit:

146 (Caption)

SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT.

Comes now the United States of America, by William J. Campbell, United States Attorney in and for the Northern District of Illinois, Eastern Division, and, as the result of the filing by defendant of its supplemental answer herein, submits the following additional reason for the granting of plaintiff's motion for summary judgment in this suit:

20. Order No. 41, as amended, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture of the United States on June 21, 1940, effective July 1, 1940, did not revoke and annul Order No. 41, and merely amended certain provisions of said Order No. 41, as examination of both Orders, which are parts of the record herein, clearly discloses. The Agricultural Marketing Agreement Act of 1937 does not empower the Secretary of Agriculture to "revoke and annul" an order or any provisions of an order. Said Act, (Section 608c (16), does authorize the Secretary to terminate an order "whenever he finds that such termination is favored by a majority of the producers—".

147 Request that Order No. 41 be terminated never has been made. However, even if Order No. 41 had been terminated, such termination would not relieve defendant of the obligations incurred by it under that order as the order specifically provides (Section 941.12(c)) that:

"If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding suspension or termination—".

Said Act (Section 608C(17) provides, also, for amendment

of orders, and in accordance therewith Order No. 41 has been amended.

Defendants have violated Order No. 41, as amended, but the plaintiff has not chosen to amend its complaint herein.

William J. Campbell,
United States Attorney.

John A. Looby, Jr.,
Assistant United States Attorney.
Mary Connor Myers,
Principal Attorney, Department of Agriculture, Washington, D. C.

189 And on, to wit, the 17th day of September, 1940 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Strike Affidavits of William B. Connor, Herbert H. Erdmann, Nikitas J. Cladakis and Otie M. Reed, in words and figures following, to wit: Filed Sept. 17, 1940.

190 In the District Court of the United States.

(Caption—1211)

MOTION OF DEFENDANT TO STRIKE AFFIDAVITS OF WILLIAM B. CONNOR, HERBERT H. ERDMANN, NIKITAS J. CLADAKIS, AND OTIE M. REED.

Now comes Wrightwood Dairy Company, defendant, by its attorneys, and moves the court to strike the following affidavits and parts thereof of William B. Connor, Herbert H. Erdmann, Nikitas J. Cladakis, and Otie M. Reed, and each of them, filed in support of plaintiff's motion for summary judgment herein, for the reasons:

1. That said affidavits do not show that the statements hereinafter pointed out were made by the affiant's own personal knowledge.

2. That the affidavits do not contain sworn or certified copies of all papers or parts thereof referred to in such affidavits which are required to be attached thereto or served therewith pursuant to Rule 56e of the Rules of Civil Procedure of the District Courts of the United States.

3. That the allegations of the affidavits, as hereinafter pointed out, are argumentative and not statements of fact as would be admissible in evidence.

Affidavit of William B. Connor.

Defendant moves to strike the entire affidavit of William B. Connor in that it appears that the affidavit is based entirely upon hearsay evidence and information procured by affiant from third persons and their records and documents, copies of which records and documents are not attached to the affidavit and whose authenticity is not in any wise proven.

The following parts of said affidavit should be 191 stricken for the reasons hereinafter assigned:

(1) "That he was designated by the Secretary of Agriculture as Referendum Agent to conduct the producer referendum in connection with the issuance of Order No. 41, Order Regulating the Handling of Milk in the Chicago, Illinois Marketing Area; and that said designation contained detailed instructions as to the manner in which the referendum should be conducted, and that he followed said instructions in every particular".

The designation containing the detailed instructions are not attached to the affidavit in order for the court to determine whether or not the affiant did actually follow said instructions "in every particular". This is a conclusion of law.

(2) "and that the More Definite Statement of Plaintiff's Claim filed herein contains a true statement of the results of said referendum, and the copies of various documents attached are true copies of the ballots and accompanying documents distributed to producers and cooperatives;"

This is a conclusion of law on the part of the affiant. There is no showing made that the affiant was present at the time of the referendum and actually counted the ballots, or does it appear that affiant has any personal knowledge that the ballots and accompanying documents were actually "distributed" to producers and cooperatives, whether by mail, personally, or otherwise.

(3) "That in preparation for this referendum, account-

ants of the Field Investigation Section of the Agricultural Adjustment Administration, under his direction, prepared a list of the names and addresses of all known producers who, during the month of April, 1939, determined by the Secretary of Agriculture to be a representative period, were engaged in the production of milk for sale in the Chicago marketing area".

It is evident that the accountants of the Field Investigation Section of the Agricultural Adjustment Administration prepared a list of the names and addresses. This evidently was not prepared by affiant. The affidavits of the accountants would be the best evidence. The prepared list of names and addresses referred to in the affidavit is not attached to the affidavit.

192 (4) "and said list was prepared from the records of the various health authorities in the area, which were known to be the most reliable information available, as under the health regulations milk for use in the area as milk or cream would only be shipped in by producers who qualified to ship into the area by complying with the health regulations;"

As heretofore shown, said lists were not prepared by affiant—said lists apparently were prepared from records of various health authorities, which records are not here shown to be true and correct and authentic. The allegation that the records of the health authorities are the most reliable information available is a conclusion of law. Affiant is merely stating matters from hearsay.

(5) "and that said lists were further checked against producer payrolls of handlers of milk in the area, and the records of cooperative associations of producers shipping into the area;"

Affiant has no personal knowledge of this work and the statement is therefore purely hearsay. There is no evidence that the producer payrolls of handlers and the records of co-operative associations of producers were the true, correct and authentic records used, and no sworn or certified copies thereof are attached to the affidavit.

(6) "That in addition to the information sent to producers with the ballots, the Referendum Agent ran a legal advertisement of the referendum in the Chicago Daily Tribune and the Chicago Daily News on August 24, 1939,

and press releases describing the referendum and its purposes were sent to various newspapers within the production area, and radio explanations of the Marketing Agreement and Order, together with announcements of the closing date of the poll were given by members of the Federal and State Extension Service;"

It is purely hearsay whether or not the Referendum Agent "ran a legal advertisement in the newspapers. Copies of the legal advertisement actually published in the newspapers were not attached to the affidavit or shown to have been actually published in the newspapers. The press releases sent to various newspapers within the production area are not attached to the affidavit or shown to have
193 been published in the newspapers, nor is it shown who sent them to the newspapers.

The allegation that members of the Federal and State Extension Service made radio explanations is purely hearsay, and the persons who made them and the statements made would be the only competent evidence thereof.

(7) The last paragraph of the affidavit, purporting to give the details of the referendum, are merely conclusions of law of affiant and should be stricken.

Affidavit of Herbert H. Erdmann.

Defendant moves to strike the entire affidavit of Herbert H. Erdmann in that it appears that the affidavit is based entirely upon hearsay evidence and information procured by affiant from third persons and their records and documents, copies of which records and documents are not attached to the affidavit and whose authenticity is not in any wise proven.

The following parts of said affidavit should be stricken for the reasons hereinafter assigned:

(1) "That the same procedural steps were taken in the issuance of the Chicago order as were taken in connection with earlier orders, notably the Boston and New York orders, which were attacked and upheld in the United States Supreme Court;"

This is purely a conclusion of law and not made from personal knowledge of the affiant. Neither are the various steps shown that were taken in the Boston and New York

orders, nor are the orders and the various steps therein referred to or copies thereof attached to the affidavit, as required by the Rule.

(2) "That in connection with the prices established in order No. 41, with regard to which defendant in the instant case contends that the pre-war period should have been used in determining parity prices, there were no statistics available in the Department of Agriculture sufficient to enable the Secretary to determine such prices, and Department of Agriculture statistics, which are the most comprehensive in the country, were specified in the Act; there-
194 fore, also in accordance with the Act, the post-war period was used."

Affiant was not connected with the Department of Agriculture at the time said order was promulgated and is not now with the Department of Agriculture, and any statement made by said affiant as to what records were contained in the office of the Secretary of Agriculture is purely hearsay, not made from affiant's own knowledge, and therefore not competent.

(3) "The prices determined under the order formulae actually were lower than the post-war prices because existing economic conditions in the area did not justify fixing of post-war period prices, all in accordance with Section 8c (18) of the Act;"

This allegation is purely a conclusion of the affiant. The respective prices, those determined by the order and the post-war prices should be set forth and the question of whether it is actually lower or not could then be determined by the court.

The affidavit does not show that the affiant has any knowledge or is competent to testify as to prices.

(4) "That the marketing area as defined in the order includes the territory within the corporate limits of the Cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe, all in the State of Illinois, and evidence in the hearing record indicates that such area includes territory in which milk of a comparable quality is sold."

The entire balance of the affidavit purports to set forth what the testimony in said record was and refers to certain pages of the hearing record, and concludes:

"On the basis of such testimony, the order therefore provides that any Class I milk which is sold in the terri-

tory out of said prescribed sales area by handlers operating under order 41 is priced according to the prevailing prices in such territory."

All of the allegations pertaining to what occurred at the hearing and what the testimony was at the hearing is clearly hearsay evidence. The testimony itself, or that portion relied upon, was not attached to the affidavit, as required by the Rules of court, and all of the allega-
195 tions pertaining to what occurred at the hearing should be stricken.

Affidavit of Nikitas J. Cladakis.

Defendant moves to strike the following portions of the affidavit on the grounds that the same were not made by affiant on personal knowledge; that said affidavit is argumentative; that the facts therein set forth are not such facts as would be admissible in evidence, and fails to show affirmatively that affiant is competent to testify to the matters therein stated, and refers to papers and documents, sworn or certified copies of which, or parts thereof, referred to in said affidavit were not attached to or served therewith:

(1) "That he is familiar with the information and data submitted to the Secretary of Agriculture during the public hearings held prior to the promulgation of Order No. O-41, including those figures relating to general conditions of supply and demand throughout the milk shed within which milk is produced for sale in the above-mentioned marketing area."

No sworn or certified copies of the information and data submitted to the Secretary of Agriculture during the public hearings, including those figures relating to general conditions of supply and demand throughout the milk shed, were attached to said affidavit or served therewith, as required by Rule 56(e) of the Supreme Court.

Practically the entire balance of the affidavit is based upon the information secured by affiant from these documents, and said averments are purely hearsay.

(2) That portion of the said affidavit, being the third paragraph appearing on p. 2 thereof, beginning with the sentence:

"In accordance with the customary practice in the mar-

ket, three clases of milk are established by the order." down to the end of the first paragraph appearing on p. 5, ending with the sentence:

"Without sufficient control such a result is inevitable and has been experienced many times in this market, even as recently as the first half of 1939."

196 An examination of the above portions of the affidavit will disclose that the same is replete with conclusions of law and opinions of the affiant, none of which is competent as evidence.

(3) That portion of the affidavit appearing in the second paragraph, p. 5 of said affidavit, reading as follows:

"That the Wrightwood Dairy Company is a handler in the Chicago marketing area and purchases approximately 16,500 pounds of milk per day from approximately 66 producers located in Illinois, and purchases, also, some milk from other handlers; and that the Wrightwood Dairy Company has failed and refused to make any reports to the Market Administrator as all handlers are required to do under the provisions of Section 941.3 of the Order, without which information it is impossible for the Market Administrator accurately to compute the blended price to be paid for milk during any delivery period by all handlers to all producers in the marketing area."

The allegation that it is impossible for the Market Administrator accurately to compute the blended price is a conclusion of the affiant, and the facts, if any, to support such statement should be alleged.

(4) That portion of said affidavit, being the last paragraph of said affidavit, appearing on p. 6 thereof, reading as follows:

"That failure and refusal of any handler in the marketing area to comply with provisions of the order becomes known throughout the market promptly and causes immediate unrest and if permitted to continue leaves to complying handlers only two alternatives: (1) to violate the order to meet the competitive advantage of non-complier, or (2) to compete with an unregulated handler who has a price advantage equal to the amounts of administrative and marketing service assessments; and experience has shown that the first alternative is invariably chosen."

The allegations in the foregoing paragraph are clearly conclusions of law of the affiant and fail to set forth facts

as would be admissible in evidence; and said affidavit fails to show that the affiant is competent to testify to the matters stated therein.

197 Affidavit of Otie M. Reed.

Defendant moves to strike the entire affidavit of Otie M. Reed in that it appears that the affidavit is based entirely upon hearsay evidence and information procured by affiant from sources not disclosed, and refers to documents and records, copies of which records and documents are not attached to the affidavit, and whose authenticity is not in any wise proven.

The affidavit is divided into three parts. The first part is an exposition of the milk industry. The allegations therein contained are not in any wise material or relevant to the issues on the application for a summary judgment and should be stricken. It refers to the record of the public hearings, held on June 26-30, 1939, but sworn or certified copies of those papers or parts thereof referred to have not been filed or served therewith. The affidavit is replete with conclusions of law and conclusions of the affiant, such as:

"That by June 15, 1939 market conditions had become so chaotic that organized producers were compelled to reduce their prices, etc.

* * * * *

and even this reduction failed to bring about stability of the market.

* * * * *

The substantial interstate moving of milk into the market made the problem one with which State authorities could not cope. It appeared therefore that a Federal regulatory program was necessary to stabilize market conditions, etc. (p. 4).

* * * * *

The economic status of producers supplying milk to the Chicago marketing area is indicated by * * * (p. 4)."

The affidavit purports to give certain data with regard to gross and cash income from milk sold in Illinois and other states, and an index of prices for commodities bought in 1938, but the basis of said information is not disclosed.

198 "The disastrous decline in income to dairy farmers from 1929 to 1933 was caused in part by the general economic depression but was also caused in part by unstable marketing conditions in the handling of milk. The decline in the demand for milk resulted in price cutting by handlers to consumers."

This is clearly a conclusion of law of the affiant. The basis of the decline and the facts showing that there was actually a price cutting, and by whom, would be the only competent evidence on this question.

On p. 8, under the heading of "Interstate Commerce", affiant again refers to the record of the public hearings, but no sworn or certified copies or parts thereof referred to are attached to the affidavit.

On p. 8 of said affidavit appears the allegation:

"Further indication of the extent of interstate commerce of milk and its products in Chicago area is exhibit No. 8 of the hearing record, which shows the location of 95 country plants at which milk is received for sale in Chicago."

However, no sworn or certified copy of exhibit No. 8 is attached to the affidavit.

The affidavit also depends upon evidence introduced into the hearing by representatives of the Pure Milk Association, and their testimony relied upon, without sworn or certified copies of said testimony being attached to and made a part of the affidavit.

The last paragraph appearing on p. 9 of said affidavit is objectionable and should be stricken in that it is an argumentative statement of a conclusion of the affiant without setting up any facts which would be admissible in evidence.

The allegation:

"The handling of milk within the marketing area which is wholly intrastate in character directly burdens, obstructs, and affects the handling of milk in the marketing area which is interstate in character and, to avoid inequitable discrimination, all handlers in the market must be subjected to the same regulation."

199 is a conclusion of the affiant without the allegation of any facts to support it.

The third portion of the affidavit is headed "Explanation of the provisions contained in Order No. O-41 (p. 10). Since the order is the best evidence of what it contains, the explanation made by the affiant is not competent and

does not tend to prove any of the issues in this case. It is replete with the conclusions of the affiant without the allegations of any fact to support it.

Wherefore, defendant prays that said affidavits and each of them be stricken, and that the defendant have such other and further relief as the court may deem necessary and equitable in the premises.

Alvin E. Stein,
Alvin E. Stein,
10 South La Salle Street,
Chicago, Illinois,
Randolph 6727,
Pines, Stein & Beber,
Pines, Stein and Beber,
10 South La Salle Street,
Chicago, Illinois,
Randolph 6727,
Abraham Lepine,
Abraham Lepine,
Attorneys for the Defendant.

Entered Sept. 17, 1940.

187 And afterwards, to wit, on the 17th day of September, 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

188 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1211) * *

Tuesday, September 17, A. D. 1940.

Present: Hon. Charles E. Woodward, District Judge.

This cause coming on to be heard upon the defendant's motion to strike affiadvits of William B. Connor, Herbert H. Erdmann, Nikitas J. Cladakis and Otto M. Reid and upon the plaintiff's motion to strike parts of defendant's affidavits opposing motion for summary judgment, motion to strike counterclaim, motion to dismiss, and the Court having heard the arguments of counsel It Is Ordered that this cause be and the same is hereby continued for further hearing to September 27, A. D. 1940.

140 And on, to wit, the 17th day of September, A. D. 1940, came Ernest Allen by his attorneys and filed in the Clerk's office of said Court his certain AFFIDAVIT in words and figures following, to wit: Filed Sept. 17, 1940.

141 (Caption)

State of Illinois, } ss.
County of Kane. }

ERNEST ALLEN, being first duly sworn, upon oath deposes and says:

(1) That he resides at Hampshire, County of Kane and State of Illinois, where he owns, manages or controls a farm for the production of milk.

(2) That during the month of April, 1939, he was engaged at his said farm in the production of milk for sale in the Chicago, Illinois marketing area.

(3) That the milk produced by this affiant, averaging ..... pounds per days, was delivered in the month of April, 1930 to the following named condensary and whose plant is located as follows:

Name of Condensary	Location of Plant
Wrightwood Dairy Company	Chicago, Illinois

(4) That said condensary, as affiant is informed and believes, delivered for sale in the Chicago marketing area, cream, butter, and other milk products manufactured from this affiant's milk.

(5) Affiant further states that he did not, on or about August 19, 1939, or at any other time, receive from William B. Connor, Referendum Agent of the United States Department of Agriculture, Division of Marketing and Marketing Agreements, a copy of the tentatively approved marketing agreement, and did not receive a ballot for use in casting his vote in the referendum as required by law, and did not receive any other request to vote in said referendum to evidence his approval or disapproval of said tentative marketing agreement as a producer engaged in the production of milk for sale in the Chicago, Illinois marketing area during the month of April, 1939, and that he did not cast a ballot in said referendum.

(6) That affiant, as a producer, if given an opportunity to cast his ballot in said referendum, would have voted

against the approval of said tentative marketing agreement.

Ernest Allen.

Subscribed and Sworn to before me, a Notary Public in and for the County and State aforesaid, this 16 day of September, A. D. 1940.

Albert H. Frederick.
(Seal) *Notary Public.*

My Commission Expires: 1943.

Filed Oct. 4, 1940.

148 And on, to wit, the 4th day of October, A. D. 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion to Strike Third to Eleventh Defenses in words and figures following, to wit:

149 (Caption)

MOTION TO STRIKE THIRD, FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, TENTH AND ELEVENTH DEFENSES.

Comes now the United States of America by William J. Campbell, United States Attorney in and for the Northern District of Illinois, Eastern Division, and in accordance with the provisions of Rule 12(f) of the Rules of Civil Procedure for the District Courts of the United States, moves to strike the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses set forth in the Answer herein, for the reason that said defenses are immaterial, and for the purpose of simplifying the record herein.

William J. Campbell,
William J. Campbell,
United States Attorney.

John A. Looby, Jr.,
John A. Looby, Jr.,
Assistant United States Attorney.

Mary Connor Myers,
Mary Connor Myers,
Principal Attorney, Department of Agriculture.

150 And afterwards, to wit, on the 4th day of October, A. D. 1940, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Oct. 4, 1940.

151 (Caption)

This matter coming on on the motion of plaintiff for a summary judgment under Rule 56 of the Rules of Civil Procedure:

And the Court having examined the pleadings and affidavits in support of and in opposition to the granting of said motion finds that there is a genuine issue as to certain material facts, hereinafter more particularly set forth:

It Is Therefore Ordered, Adjudged and Decreed that said motion be and the same is hereby denied.

And the Court having examined the pleadings and certain affidavits finds:

I.

That the following material facts exist without material controversy:

(1) The defendant, Wrightwood Dairy Company, is a corporation organized on April 5, 1932 under the laws of the State of Illinois with its principal business in Chicago, Illinois, for the purpose of handling milk and milk products. In connection with the operation of its business, it acquired the premises known as 2942-48 North Ashland Avenue, Chicago, Illinois, together with machinery, equipment, milk routes and other valuable personal property of a value in excess of $100,000.00.

(2) On August 28, 1939 the Secretary of Agriculture of the United States issued Order No. 41, order regulating the handling of milk in the Chicago, Illinois, marketing area, a copy of which is attached to the bill of complaint and marked Exhibit "A".

152 (3) Order No. 41 was published in the Federal Register on August 30, 1939 to become effective on September 1, 1939.

(4) The defendant purchases, and for some time prior to the filing of the complaint had purchased approximately

30,000 pounds of milk per day from approximately 70 producers located entirely within the State of Illinois, and has purchased no milk from any producer located outside the State of Illinois. The milk so purchased is processed by the defendant in its plant in Chicago and is sold and distributed within the State of Illinois in competition with the milk of other handlers in the area, and no portion is intended to be sold or is sold for use outside the State of Illinois. No portion of the milk handled by the defendant prior to its ultimate distribution by the defendant is physically and inextricably in any wise intermingled in the processing plant of the defendant with milk which has crossed state lines.

(5) The defendant has made no reports to the Market Administrator since the effective date of the order.

(6) The defendant has made no payments to the Market Administrator for deposit in the Producer-Settlement Fund, established pursuant to Section 941.8, Paragraph (b) of said Order No. 41.

(7) The defendant has made no payment to the Market Administrator of its pro-rata share of the administration of the order as required by Section 941.9 of said Order No. 41.

(8) Milk sold and distributed in the Chicago, Illinois, marketing area is produced in four states—Illinois, Indiana, Wisconsin and Michigan. Over 60% of all the milk handled in the Chicago, Illinois, marketing area is produced in the State of Illinois and less than 40% is
153 brought in from the other above named states. Prior to the issuance of Order No. 41, 60% of the milk sold and distributed in the Chicago, Illinois, marketing area was produced in Illinois, 23% was produced in Wisconsin, 16% was produced in Indiana and 1% was produced in Michigan.

II.

The following material facts are actually and in good faith controverted:

(1) The following allegation in Paragraph 4 of the complaint, denied in the answer:

"The order was issued by the Secretary in full compliance with law. All conditions precedent to the effectiveness of said order have occurred."

III.

It Is Further Ordered that the respective motions of the plaintiff to strike the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th defenses, together with the motion of the government filed on June 4, 1940 to dismiss defendant's counterclaim be set down for oral argument at a time later to be fixed by the Court.

Enter:

Charles E. Woodward.

Dated October 4, 1940.

213 In the District Court of the United States.

* * (Caption—1211) * * *

Stenographic Report of proceedings had before the Honorable Charles A. Woodward, one of the Judges of said Court, in his court room in the Federal Court House at Chicago, Illinois, on Tuesday, October 29, 1940, at ten o'clock A. M.

Appearances:

Messrs. Pines, Stein & Beber, By Mr. Stein, For the Plaintiff;

Miss Mary Connor Myers, Principal Attorney, Solicitors' Office, Department of Agriculture; Mr. John Looby, Assistant United States Attorney, For the Government.

214 The Court: Everybody ready?

Mr. Stein: Yes, Your Honor.

The Court: All right, go ahead.

Miss Myers: May it please the Court, the Government is moving to strike defenses 3 to 11 of the Defendant's answer under the provisions of Rule 12-F on the ground that they are immaterial, and redundant. The actual reason is mainly to simplify the record. All of those defenses have been argued to the Court at one time or another, but I will review them very briefly.

The third defense—

Mr. Stein: Pardon me. May I just interrupt at this time? No written motion was filed by the Government in

that connection. Apparently it was Your Honor's suggestion that that be done, but it has never been complied with.

Miss Myers: Oh, I am quite sure that motion was filed, a motion to strike the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defenses.

Mr. Stein: If you did so you never served me with a copy of it.

Miss Myers: I have not the service record here.
215 It was not served. The motion was not served upon defendants because the matter had been discussed.

The Court: It was filed on October 4th.

Miss Myers: It was filed. It was discussed with the Judge and counsel. Counsel knew that the motion was to be served upon him.

Mr. Stein: I did not know anything about it except that it appeared in Your Honor's order, but I never had a copy of it.

Miss Myers: It was discussed.

Mr. Stein: I won't stand upon that as an objection, but I merely—I didn't know there was such a motion filed.

Miss Myers: It was discussed in the Judge's chambers. I said it would be filed immediately.

Mr. Stein: I thought that was clearly understood and the grounds for it were understood, too.

The Court: I understood it was covered generally in that memorandum.

Miss Myers: It was covered in that memorandum and that also.

Mr. Stein: Oh, I see.

Miss Myers: In the third defense, Defendant claims to be exempt from the order because it is engaged in
216 intrastate commerce. That, of course, would be decided upon the averments of the complaint and the second defense, and the Government in the complaint describes the Defendant as conducting an intrastate business in an interstate market. The Court has found the market to be an interstate market, and the Defendant sells in competition with other handlers in the area. All that remains is a question of law which I say can be determined upon the complaint and the second defense.

The fourth defense of the Defendant questions the base period determined by the Secretary of Agriculture, a question which could also be raised under the averments of the complaint and the second defense. That defense, therefore,

is redundant and the Court has already expressed the opinion that the question was purely an administrative one, not subject to judicial review.

In the fifth defense Defendant alleged unconstitutionality of the act and order. That is redundant for the same reason as the fourth defense, and the Court has already indicated he does not care to listen to arguments on that point in the light of the Supreme Court decision in the
217 Rock Royal case.

In the sixth defense the Defendant refers to the Sherman Anti-Trust Act, and claims that compliance by handlers would be a violation of the Act and the order, and makes the situation susceptible to regulation under the Sherman Act. That defense would be immaterial, even if it were true, which it is not, as the order was issued under a separate act of Congress and conforms to that Act.

The seventh defense, the Defendant made some statements in connection with the Anti-Trust law of the State of Illinois. Those averments also are immaterial, even if true, as the Federal Act will supersede the State Act under any circumstances.

The eighth and ninth defenses, the Defendant questioned who the producers eligible to vote in a referendum were and the method of conducting a referendum. Those defenses were also redundant because some questions could be raised under the averment of the complaint and the second defense.

And the tenth defense, the Defendant questioned the marketing area established in the order, and that defense also is redundant for the same reasons as the last. The
218 Court has already held that was a purely administrative matter.

In the eleventh defense the Defendant questioned whether the Secretary arrived at a proper economic base for the order. That also is redundant as a defense and the Court has stated that it will not consider that defense.

All of these defenses are highly argumentative and clearly violate Rule 8 (e), of the Rules of Civil Procedure which requires that each averment of a Pleading shall be simple, concise and direct. The Government submits that all of these defenses should be stricken.

The second motion filed by the Government, under consideration, is a motion to strike the Defendant's counter claim. The Defendant has demanded that the Court enjoin

the Plaintiff from enforcing Order 41 on all the grounds set forth in its answer, including the contention that the Act and Order are unconstitutional.

The counter claim on its face shows it rests upon matters of the defense set up in the answer as it incorporates those matters of defenes by reference.

Rule 13 (b) of the rules of civil procedure 219 provides:

"A pleading may state as a counter claim any claim against an opposing party, not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

Even if it be assumed that the Defendant actually has a claim, which the Government denies, because Order 41 creates no claim which a handler may advance, the Defendant could not inject it into this particular suit. The Defendant in the first paragraph of page 6 of his brief points out that the counter claim is based upon the same issues involved in the complaint and answer. The Defendant relies on Rule 13-A of the rules of civil procedure, claiming that under that rule it is compelled to make a counter claim, but in quoting the rule the Defendant drops out a very important clause. The Defendant says it must enter counter claim,

"If it arises out of the transaction or occurrence that is the subject matter of opposing party's claim".

Whereas the rule says:

"A Pleading shall state as a counter claim any claim 220 not the subject of a pending action, which is admitted by the defendant, which at the time of filing the Pleading, the Pleader has against any opposing party, if it arises out of the transaction",

and so forth. Of course, in this case by the admission of the defendant itself the counter claim is the subject matter of the pending action.

The Government contends that under any circumstances the relief sought could only be obtained from a statutory three-judge court under the provision of the Judicial Code. The defendant says that provision does not apply to suit taxing administrative regulations, but the courts have held that the regulations of an executive department become law by force of an existing statute.

In that connection I would quote the case of *In Re Hall*, 167 U. S. 38; *United States* v. *Taylor*, 104 U. S. 216; *De-*

Groot v. *United States,* 5 Wall 419; and *Lynch* v. *United States,* 292 U. S. 571.

The defendant contends that it must have injunctive relief because there is nothing to prevent the plaintiff from dismissing this action without securing an adjudication
221 upon the validity of the order and the Defendant would be compelled to either comply or institute a separate proceeding.

That reduced me to a slightly dazed condition, myself, Your Honor, but apparently the Defendant has overlooked Rule 41 (a) of the Rules of Civil Procedure which protects them from such dismissal of this suit, and also I don't know under what condition, or what new circumstances imagined by the Defendant, would prevent their continuing to violate as they have done already, since the order was passed in September. The Government contends there is no merit to the Defendant's counter claim, and it should be dismissed.

I am not going to go into either one of those cases because Your Honor is thoroughly familiar with the law in both cases and has heard the facts in connection with each of these defenses and discussed it at considerable length. As far as we are concerned, as far as the Government is concerned, all that remains is the taking of testimony on the one controverted fact whether the order was issed in compliance with the law. I don't know whether the opponents will, but the Government is going to contend
222 that the burden of proof in that case is on the Defendant.

The Court: Let us dispose of these.

Miss Myers: That is what I thought.

Mr. Stein: If the Court please, we have filed voluminous briefs in support of our motion to dismiss, in which we discussed at length the question—one of the most important questions involved in this action—as to whether or not the Defendant is or is not a handler within the meaning of the statute, and the meaning of the order herein sought to be enforced.

In our argument we show that at the time the statute or act was enacted, certain committee reports were submitted both to the Senate and the House of Representatives incorporating the construction that they placed upon the act as it was then amended. We show in our original brief, which I presume Your Honor has here, and to which we can refer, that the original Act, the Agricultural Adjust-

ment Act of 1933, was changed in 1935, and after the 1933 Act was declared unconstitutional; and at that time these various amendments were made to the Act and the question was raised as to whether or not it could possibly
223 include a situation where a handler of milk was engaged in the business of buying milk from farmers within the State of Illinois and selling it within the State of Illinois, where no portion of the milk is in any wise intermingled with any nterstate milk, where no portion of the milk is in any wise intermingled with any interstate milk, where no portion of the milk is intended to be sold outside of the State of Illinois and is not actually sold outside of the State of Illinois.

In that connection we refer in our answer to these committee reports and debates and which the persons who were in charge of the bills discussed that question, and in that connection I will want to offer these various reports in evidence, and with regard to the efficacy I desire to read a portion from the *Duplex Printing Company* v. *Deering* case in the 254th U. S. at page 474:

"By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body."
224 Citing cases.

"But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns* v. *United States*, 194 U. S. 486, 496. And this has been extended to include explanatory statements in the nature of supplemental report made by the committee member in charge of a bill in course of passage."
Citing numerous cases.

This involved the Clayton Act, and the Court here says:

"Moreover, in the case of the Clayton Act, the printed committee reports are not explicit with respect to the meaning of the 'ceasing to patronize' clause of what is now Section 20. (See House Rept. No. 627, 63d Cong., 2nd sess., pp. 33-36; Senate Rept. No. 698, 63d Cong., 2nd sess., pp. 29-31; the latter being a reproduction of the former.) But they contain extracts from judicial opinions and a

then recent text-book sustaining the 'primary boycott', and expressing an adverse view as to the secondary or coercive boycott; and, on the whole, are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

"Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The question whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative. The subject—he declared in substance or effect—was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confirming boycotting to the parties to the dispute, allowing parties to cease to patronize and to ask others to cease to patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott, it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since in our opinion its proper construction is entirely in accord with its purpose as thus declared, little need be added."

In the Senate report—by the way, there are two reports that were submitted to the Senate, one to the Senate and one to the House. While they are identical in language—

Miss Myers: What is that citation, Mr. Stein, please?

Mr. Stein: I am reading from the Senate reports on public bills, the 74th Congress, first session, volume 9880, at page 8.

Incidentally, Your Honor, the reading of this report will aid considerably in clarifying the purposes and the changes that were made in the law as expounded by the committee and as reenacted.

Now, in this report the committee says:

"To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter, et al. v. United States*, the provisions relating to orders, enumerate the commodities to which orders issued by the Secretary of Agriculture may by applicable, prescribe fully the administrative procedure to be followed by the Court in issuing and enforcing orders, specify the terms which may be included in orders dealing with the enumerated commodities, the powers to be exercised under the proposed bill are confined within the limitations upon the federal authority over Interstate Commerce as expressed by the Supreme Court in the Schechter case and other cases".

228 Can Your Honor see the scope of orders under the proposed Section 8 (c) as limited to the regulation of the handling of specific commodities of the current of interstate or foreign commerce, the handling thereof which directly burdens, obstructs, or affects interstate or foreign commerce in such commodities or products thereof.

Section 84 of the Agricultural Act now authorizes the Secretary of Agriculture to enter into a marketing agreement with producers or others engaged in the handling of other agricultural commodity or products thereof in competition with interstate or foreign commerce. This phrase has been omitted from the proposed bill which deals with the orders, as well as the proposed Section 8 (b) which deals with the marketing agreement, and under the proposed language makes it clear that the full extent of the Federal control is intended to be rested in the Secretary of Agriculture, in connection with the order.

The same identical report was made to the House, House report number 1241, appearing in Reports on Public Bills, Volume 3, 74th Congress, First Session, Number 9888.

229 When this bill came up for discussion in Congress, and I am now reading from the Congressional record, Volume 79, Part 10, 74th Congress, First Session, June 29, 1935, to July 20, 1935. I have typewritten excerpts from pages 11134 and 11135. This is a discussion in which Mr. Smith, who made the report in the Senate took part. He was on the committee. (Reading:)

"Mr. Tydings: It is the understanding of both the Senator from Iowa and the Senator from Wisconsin that the agreements and the orders issued by the Federal Government apply only to milk which is in interstate commerce,

and do not under any circumstances apply to milk in intrastate commerce?

"Mr. La Follette: My understanding is that the phraseology in the bill—I am not sure that I can turn to it at once—insofar as it defines interstate and intrastate—

"Mr. Smith: It appears on page 10 of the bill.

"Mr. La Follette: As I have read it in each particular case, if a legal controversy arose, there would have to be an adjudication by the courts to ascertain into which classification the shipment in controversy fell. In other
230 words, the court would have to find the fact as to whether or not it actually flowed in interstate commerce or tended to obstruct interstate commerce.

"Mr. Tydings: In order to bring the example before the Senate in a concrete way, let us suppose milk is produced in a State and sold within that State.

"Mr. La Follette: My interpretation would be that that would not fall in the classification of moving in interstate commerce, or flowing in interstate commerce, or directly burdening or obstructing interstate commerce.

* * * * * * *

"Mr. Tydings: In my judgment, however, Mr. President, if milk originates in the same State where it is sold, it is intrastate commerce, and the Federal Government has nothing to do with that particular shipment of milk. The Senator from South Carolina (Mr. Smith) and the Senator from Nebraska (Mr. Norris) and the Senator from Idaho (Mr. Borah), as well as I—"

Mr. Smith was chairman of the committee.

231 "all agreed the other day that this was an interstate provision only, and I do not think that construction can be too greatly accentuated in this discussion, so that the Federal agency charged with administering this provision will not attempt to regular intrastate shipments, when such shipments are not within the purview of the law.

"Mr. Borah: Mr. President, the language on page 10 'as directly burdens, obstructs, or affects interstate or foreign commerce', is purely surplusage. It does not add anything whatever to the power of control by the Congress. It may be, that language having been used, that someone may assume it gives an additional control over intrastate commerce; but the court would have to determine for itself in each particular case whether intrastate commerce did directly affect or directly burden interstate commerce.

In other words, the language herein, in my opinion, adds nothing whatever to the power of Congress.

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232 "Mr. Tydings: I agree completely to what the Senator from Idaho has said. My only reason for restating the proposition is that if the Federal agency charged with the administration of this provision were to serve notice upon a producer of milk that the Federal Government had jurisdiction, the producer might be frightened into the belief that if he did not carry out the Government's order he might be fined or put in jail, or that something else might be done to him; and I want it known by this debate, iterated over and over again, that if the Congress passes this proposed act it is presumed that those who are charged with its administration will not, in the case of an intrastate shipment of milk, attempt to issue Federal orders and thereby cause producers to be put to the expense of hiring lawyers to prove that the Federal Government has no right to do the thing which it is attempted to do.

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"Mr. Tydings: I may say to the Senator from Iowa that even if intrastate milk did become commingled
233 with interstate milk, in so far as the man who produced and sold in the same State is concerned, that would not affect his situation. But here is the point: As we all know, the twilight zone, which the Senator from Wisconsin just described, offers an opportunity for the Federal Administrators to issue orders to State shippers and producers of milk where the whole transaction is within a State, which will force them to go to law in order not to be bound in cases by the Federal decree. I want it distinctly understood that it is the sense of the Senate that those in charge of the administration of this provision will have no right to issue orders which will take over the government or control or the price-fixing or any other phase of the milk situation where the milk is produced and where it is sold always within the same State.

"Mr. Dickinson: The very purpose of the 'weasel' words to which the Senator from Idaho has just referred is to do the very thing the Senator from Maryland has said should not be done.

234 "Mr. Tydings: I quite agree with the Senator, but I want it made clear that the Senate does not interpret the provision in that way. In so far as I know, no

Senator upon this floor claims that the Federal Government has anything to do with milk which is produced and which is sold in the same State; and that ought to be the way in which the proposed act will be enforced."

235 Now, in the committee report it is expressly provided that the interpretation that they placed upon the law was that as laid down in the Schechter case, and the definition of the words directly obstruct interstate commerce, directly obstruct or affect interstate commerce, and that decision if followed would leave no question in this case in so far as the Defendant's liability, or Defendant's coming within the provision or definition of a handler.

However, counsel here contends that the Rock Royal case has in some way changed the law definitely laid down in the Schechter case, that it is only such interference with Interstate Commerce as would—must be a direct interference, otherwise it would not aid interstate commerce or affect interstate commerce.

Now, in our brief we show numerous cases both in this jurisdiction and others, under the original Agricultural Adjustment Act, where whenever an administrator has sought to enforce laws against a defendant who was residing within the state and doing a purely intrastate business, that that could not be controlled by the Federal Gov-

236 ernment and injunctions were refused on behalf of the Government, and were definitely allowed by way of counter claim on behalf of defendants to enjoin the administrator from enforcing it as against a defendant who was doing purely an intrastate business.

We then showed that the law was amended and in what manner it was amended by the House by the insertion of the so-called weasel words, which are embodied in Section 8 (c), Paragraph 1:

"The Secretary of Agriculture shall, subject to the provision of this section, issue from time to time orders"—and so forth.

"Such persons are referred to in this title as handlers. Such orders shall regulate in the manner in the section provided, only such handling of such agricultural commodity or products thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs or affects interstate or foreign commerce, any such commodity or product thereof."

That language was inserted in 1935. Then later on they saw fit to amplify the meaning of interstate com-

merce by the insertion of Section 10-J, and that definition, Your Honor will find, conforms absolutely to the definition as laid down by the Supreme Court in the Schechter case.

This is the provision of Section 10 (j):

"The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or devices intended to remove transactions in respect thereto from the provisions of this Act."

We showed that under the Agricultural Act of 1933, the courts were uniform in holding definitely that any transaction involving purely intrastate matter where milk was bought and sold, was raised, bought and sold within the same state, was not within the purview of the Federal law.

We showed that in the laws of 1933 and '35, at the time the Senate and the House of Representatives passed that law, with the understanding that the interpretation that was placed upon interstate commerce, as it then was known, was to be followed, confined and limited in accordance with the decision in the Schechter case, and Senate debates clearly show, in order that there may be no misunderstanding with regard thereto, that it was the intent of the Senate that no Senator had any other idea but that any intrastate transaction wherein the milk that was raised in one state and was sold in that state should not be con-

trolled by the Department of Agriculture, and that no order shall be effective. It was passed with that understanding.

We contend it is a circumstance that the Court should and must take into consideration in the interpretation of this law; in other words, the Senate would not have passed that Act unless it was with the definite understanding that the law as laid down and the rules that are laid down in the Schechter case will be followed:

Now, then, in order to further support that interpretation of the law, Congress passed another provision which had not theretofore been in the law, whereby the Secretary of Agriculture in Section 10 (i) is permitted and requested, in effect, to co-operate with the states in the regulation of their state programs and to prepare complementary orders to state laws.

That section reads as follows:

240 "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture."

And so on.

In the committee's report, the committee calls atten-
241 tion to this fact, and they say they did not thereby intend to increase in any way the power of the Secretary of State, but on the contrary to clearly recognize the authority of the State over intrastate business, and in that connection in the Senate Report, reading from page 1[illegible] of that same committee's report under the heading "Co[illegible]eration with States", Section 18, was added to the section of the present Act which gives the Secretary of Agricul-

ture miscellaneous power under the subsection just cited, for the cooperation between the Secretary and the State agencies. This power probably exists under the present law.

Then they discussed that situation. They say notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the fields of the States for the limitation of the Act and the Constitution forbiding Federal regulation in that field, and this provision does not indicate the contrary, nor is there anything in the provision to force the states to cooperate, which sovereignty operates in this sphere to get him to exert his effort in conformity rather than in conflict.

242 Now, in the Rock Royal case the State of New York had passed a State law with regard to the control of milk and milk products. And the Federal administrator sought also to control that industry within the New York area. In that particular case the State administrator filed an intervening petition and sought to intervene with regard to certain orders that he sought to enforce in regard to these defendants. However, it appears from the opinion in the case that the four defendants were the sole defendants in the case and had all admitted on the record that they were engaged in interstate commerce and that they were subject to the Federal law, and it also appears had not taken issue upon any of the alleged facts that they were charged with, namely, that there was a comingling of milk in interstate commerce, that they were actually engaged in interstate commerce, and the Court, Supreme Court, in its decision finds that this being interstate commerce, therefore, the intervening petition on behalf of the State official was unnecessary, and it was dismissed. They clearly recognize that there is a field in the control of the milk industry that pertains entirely to local consumption and local

243 use, and another field which pertains to interstate commerce. The Nebia case was originally decided on the theory it was a state right; that under state rights they had the right under their police powers to fix the price of milk, and no one will deny that as being the proper exercise of the police rights of a state.

As a result of the Nebia case, which was the first case wherein price fixing was permitted with regard to the milk situation, the Supreme Court, by a five-to-four decision, assumes that, having decided that the state had the author-

ity to fix the price of milk under the Constitution, ipso facto, the Court has the right to fix the price of milk so far as it was within the interstate commerce clause. However, that question was not raised in the Rock Royal case nor in the Hood case, and the Supreme Court assumed, from the facts that were admitted, the fact that a large percentage of milk as it was claimed—I believe it was two-thirds; I have forgotten now. Let me refer to that Rock Royal case.

None of the facts which are in controversy here were in any wise denied, and the Court simply assumes that
244 from that it actually existed, and that fact is adverted to in the dissenting opinion, wherein they say that these facts were all admitted by the defendants, and, therefore, we are not going into it.

But the Court in the Rock Royal case says that the Secretary of Agriculture found that two-thirds of the milk produced in the New York marketing area actually moved in interstate commerce, and that the remaining one-third produced within the State of New York was inextricably intermingled with the interstate milk, and that all was handled through the current of interstate commerce so as to affect, burden, and obstruct such interstate commerce in milk and its products.

Exception was made as to the milk regulation by the order of the Commissioner of Agriculture and Markets of the State of New York, and that was in no wise controverted.

The Supreme Court—Mr. Reed writing the opinion—then assumes that these facts were true, and in 83 Law Edition, 1467, pages 306-568, discussed the constitutionality of the Act.

It says here:

245 "The Act authorizes and the order undertakes the fixing of minimum prices for the purchase of milk 'in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce' in milk. There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce. Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk."

However, the Court went out of its way to hold under the facts as shown therein that the Court had jurisdiction; that is, the intrastate transactions were governed and controlled by the particular order.

We say, however, that the cases upon which this Court relies to sustain the proposition that there is a current of interstate commerce in a situation of the kind that is involved here was quite in point as they were distinguished in the Schechter case and in the Carter case—which is *Carter* v. *Carter*—the two decisions which definitely
246 pass upon what was meant by the words: "It must directly affect or obstruct interstate commerce".

And they say in that case that they must have a direct effect upon the interstate commerce, because there is not a single product that is not in some way in competition with some article that is manufactured or raised in some other state in the same market, otherwise there would be no article at all that would not be in interstate commerce.

Now, the Supreme Court recognizes the right of the State to pass a regulatory law and control the milk in the State. That is the Nebia case, a recent Pennsylvania case, the *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S., and the *Hickman Farm Corporation* v. *Baldwin*. An examination of the validity of these local laws which are based upon the theory that a majority of the milk within the local law, as in Pennsylvania, was controlled by the State, and it was there held in the *Milk Control Board* v. *Eisenberg Farm* case that a handler of milk who bought his milk in Pennsylvania and shipped it into another state was within the State law, though he, himself, was actually engaged in interstate commerce.

247 Now, there is a twilight zone somewhere, because the Supreme Court says a portion of this milk very clearly is under State law. Congress clearly says we want the administrator to cooperate with the local administrator with regard to the milk situation and clearly recognizes that there must be—

The Court: I have not been following the local legislation of Illinois. Is there a local administrator of milk here?

Mr. Stein: I understand that there is.

Miss Myers: No, Your Honor. Do you mean State of Illinois?

The Court: Yes.

Miss Myers: And furthermore, the State has never requested the Secretary of Agriculture to cooperate in any way with the State program.

Mr. Stein: I understand there is a State law, though, that pertains to it.

Miss Myers: No price fixing regulation or market regulation.

The Court: No, I don't refer to that.

Miss Myers: No marketing price regulation. I pre-
248 sume you refer to the health regulation governing sanitary conditions.

The Court: No.

Miss Myers: There is no marketing price regulation.

Mr. Stein: As one of the Judges who I quote in my brief in support of the motion to strike, to dismiss the complaint, said, the mere fact that the State has not, the State of Illinois has not seen fit at this time to pass a price fixing or regulatory law pertaining to milk does not mean that the Federal Government would have a right to legislate with regard to a purely local intrastate situation.

The Court: What Judge is that? One of our local Judges, you mean?

Mr. Stein: Well, no, one of the decisions I quote in my brief.

The Court: Yes.

Mr. Stein: But it seems logical and correct, unless the Federal Government has control over the situation that it actually invades the police rights of the State law and would not be unconstitutional irrespective of whether the State had passed the law or not.

249 Now, we contend—I started to state now the definition. We contend that there is, as a matter of fact, no current of interstate commerce in the milk area in Chicago. Insofar as the allegations are concerned, we have the bare allegation in the complaint, if there is one, that we are either in the current of interstate commerce or that we directly obstruct or affect interstate commerce. There is no positive allegation that we had either one or the other, but we presume that that would be one of the things we would have to prove, but insofar as the fact that the Court found that over 60 percent of the milk in the Chicago area is produced in the State of Illinois, and less than 40 percent is imported from other states, that does not prove or establish in any manner the current of interstate commerce.

The term current of commerce, Your Honor will remember, was first used by the Supreme Court of the United States in the Swift case. The evidence there showed that cattle were shipped into the Chicago market, where they were slaughtered, and then sent out all over the United

States and to the world, and the Supreme Court there
250 said clearly, the livestock, the stock yards in slaughtering these animals and in shipping them out were simply a cog in a wheel. Here was a flow of commerce, namely, the cattle was herded in there, brought into Chicago and was slaughtered and again sent out and they say very clearly, "You have a current or stream of commerce"; and the stock yards at that time was simply a cog in the wheel and an incident in the entire transportation; but not so here. We have here, according to the allegation,—the Court found the Defendant is buying all of its milk from sixty or seventy farmers in the State of Illinois and transporting it here to the Chicago area, where the sales are to the Chicago consumers. Not a single drop of this milk is in any wise intermingled with any of the milk that comes in from Wisconsin or the other states.

Here is purely a transaction as far as this Defendant is concerned. It might be all within one street, or within a block, or within the State of Illinois, and no portion of this milk ever leaves this State nor is any portion of this milk in any wise intermingled with any other milk.

251 Now, this other 40 percent, or less than 40 percent that comes into this territory presumably goes to some handler of milk, who in turn sells it to a local consumer; but that milk that comes in from the other states does not in any wise conflict or affect physically any of the milk that comes from Illinois. If they can prove that all of the milk that is produced in the State of Illinois is actually comingled, as the facts were admitted in the Rock Royal case, with all the other milk that came in from the other states, then you might have at least this physical fact that there was a co-mingling with interstate products. But the evidence here is that the Defendant in no wise has any of its milk intermingled with any other milk that comes from outside of the State. There is no such flow of commerce of the type and character contemplated by the Supreme Court in the Swift case or in the Schechter case, discussed in the Schechter case. Where they are, there must be a flow, and the act done by the particular Defendant is merely an incident in the entire purpose of the transaction.

So I say, Your Honor, there is no current of inter-
252 state commerce in this State that is in any wise physically affected by anything that the Defendant does in the sale, purchase, or disposition of the local milk.

The next question then is, does the business that the De-

fendant does, in purely intrastate business in any wise directly obstruct or affect interstate commerce? And I say, so far as the allegations are concerned in the complaint, where we have no evidence at all, not a single allegation, that would indicate that the Defendant's acts in any wise, shape, or form, directly affect interstate commerce. How or in what manner? The only possible contention that may be made is that the milk that the Defendant sells is in competition with the milk that may come in from other states. That is the only thing that can be said with regard to that situation.

In the Schechter case the Supreme Court says, "Mere competition does not determine a direct obstruction of interstate commerce, because if that were true, every single product, every milk product, and everything else that is manufactured would be subject to competition from
253 some other state and there would not be a single item that would not be in interstate commerce".

I read that to Your Honor in the reports of both committees. The report shows, both in the Senate and in the House, that they have specifically omitted the words "In competition with". It was in the 1933 Act, the substitution was, in order that there might be no question; they did not mean that if an item was in competition with an item that was manufactured or transported in interstate commerce, that shall be as a criterion of what was meant by a direct obstruction of interstate commerce.

In my brief, to which I again refer Your Honor, the question of which is current interstate commerce is discussed in all these cases that were cited. The Schechter case states, "What is interstate commerce?"

There, Your Honor will remember, poultry was imported into the State of New York by Schechter brothers and then re-sold. The Supreme Court very definitely laid down the rule that was not interstate commerce, because when poultry arrived in the State of New York it had come to
254 rest. When the Schechters sold the poultry it was an intrastate commerce, and therefore the NRA had no control. In our case, of course, there can be no question but that was a local transaction, because the purchase was within the State and sold within the State.

The Court here says:

"The undisputed facts—"

Reading from 295 U. S. 543:

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held,
255 used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, and are not applicable here."

Citing several cases, the Swift case and other cases, and that the Defendant's transactions directly affect interstate commerce so as to be subject to Federal regulation.

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we
256 have cited, as e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically

all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. As we said in the *Minnesota Rate Cases*, 230 U. S. 352, 410: 'In the intimacy of
257 commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extensions of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.'' Citing cases; the Court has discussed intrastate measures. Well, it is relating to the application of the Federal Statute in its constitutional validity, the distinction between direct and indirect effect of intrastate transactions upon interstate commerce, and must be recognized as the fundamental essential to the maintenance of our constitutional system, otherwise as we have said, there would be virtually
258 no limit to Federal power and for all practical purposes we should have a completely centralized government.

259 They discussed that situation again. That is reiterated in the *Carter* v. *Carter Coal Company*, 298 U. S., where they follow the decision of the Schechter case, and they say again, in the Carter case, 298 U. S. 238:

''That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce maybe, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the 'preamble' recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the Schechter case, supra, page 546, Et seq. 'If the commerce clause were construed', we there said, 'to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the

people, and the authority of the state over its domestic concerns would exist only by sufferance of the Federal Government' ".

I read that. Then they go on to say:

"Whether the effect of a given activity or condition
260 is direct or indirect is not always easy to determine. The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are some times qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here,
261 since that question is not—What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? but—What is the relation between the activity or condition and the effect?

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively
262 in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and

minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.

"The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the Schechter case, supra. The only perceptible difference between that case and this is that in the Schechter case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate
263 commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the Schechter case. On the contrary, the situations were recognized as akin. In the opinion, at page 546, after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: 'Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control'. And again, after pointing out that hours and wages have no direct relation to interstate commerce and that if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and
264 prices and their indirect effect upon interstate commerce, we said, p. 549: 'All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.' A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages,

hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."

Now, I heretofore pointed out to Your Honor in the Rock Royal case, and I think counsel will admit whatever might have been said in that decision is pure dictum. The cases that the Court relies upon as giving authority to the Federal Government to control purely intrastate trans-
265 actions do not support that contention, and I distinguish in my briefs, both in the original brief in support of my motion to dismiss and my reply brief. Similar distinctions were made in various law reviews where the Rock Royal case is not only discussed, but condemned as not being in accordance with the law on that phase of the question, and not supported by the authorities.

Now, subsequent to the Rock Royal case we find several decisions where the courts without examining the case carefully, without recognizing the fact that the decision there was, in truth and in fact, dictum; that all of the facts upon which the Supreme Court found that milk was actually commingled, was in the actual current of commerce. In other words, they account for 100 per cent of the milk as being within the particular current of commerce, two-thirds as coming from out of the state, one-third being physically intermingled with the other. It is not necessarily the fact, and is not the fact in this jurisdiction, and in view of the admitted facts as far as the defendant is concerned, does not and could not apply, because it is admitted here that no portion of the defendant's milk is in any wise inter-
266 mingled with interstate commerce milk, so that the basic facts and the dictum could not in any wise control this case.

We feel that this case is, insofar as it raises the question of whether or not the Defendant is a handler of milk within the meaning of the Statute and the rule enacted by the administrator, the Secretary of Agriculture, I should say, that we are clearly not a handler as we are not in interstate commerce, nor does our transaction of business in any wise directly affect or obstruct interstate commerce. That the mere competition, if such competition is proved, when Defendant attempts,—Plaintiff attempts to prove its case, would not constitute such a direct interference with interstate commerce that it would come within the statute or purview of the definition, because as here-

tofore pointed out, in order that there be a direct distinction, you must have something that goes to the very essence of the matter involved, and not indirectly or remotely.

If the Federal Government could control the milk industry on the theory that it includes all local transactions, then, Your Honor, they might just as well control the
267 freight in any other commodity that might be created upon the theory that somewhere, at some time or other, some of the same products are in competition with local products; and there would be nothing from the pen point down to the inkwell, the desk or anything else, that would not be in competition, or would not be under Federal control. That certainly was not contemplated by Congress when they passed the Act, and was not contemplated under the Schechter law which they said they followed; and was not contemplated by the framers of the Constitution when they delegated certain specific powers to Congress and reserved certain powers to the State. The provision with regard to engaging in local business is reserved to the State and the right to control that business is purely a State right.

The Supreme Court has, in some instances, as pointed out, shown that there may be an intrastate transaction that might be, might so affect and so obstruct interstate commerce, that it could not properly be enforced without material injury to everyone else; but that situation is not here. There is nothing shown here excepting a purely local transaction, no current of interstate commerce with
268 regard to that. If anything, there are two currents, if you please, of commerce; one purely a local, and another an interstate commerce. One has nothing to do with the other, except as I say, that they might be in competition, and that is not a direct effect; it is different, separate and distinct from others.

Now, that, if the Court please, is the third defense that the Defendant relies upon, and we submit is a vital question, and the motion to dismiss with regard to that should be denied, and as a matter of fact our original motion to dismiss the complaint on that ground should be sustained.

Now, in our second defense, unless the Court has some question in regard to this question—

The Court: I made certain findings. I suggested certain findings that were not in controversy.

Mr. Stein: Yes, Your Honor.

The Court: In my memorandum; I see I stated in this connection the Defendant sets up the method for conducting his business substantially as heretofore set forth in this memorandum. Where did I get the fact to make that statement from?

Miss Myers: That is in their counter claims.

269 Mr. Stein: That appears, Your Honor, we allege that in our defense.

Miss Myers: In the complaint here.

The Court: I got that from the third defense?

Mr. Stein: That is from the third defense, yes.

Miss Myers: No, Your Honor.

Mr. Stein: It also appears—

The Court: While he was talking I was trying to figure it out in my own mind.

Miss Myers: It is the contention of the averments of the complaint, an enlargement of those that appear in the counter claim. We made no objections—

The Court: You made a motion then to strike the counter claim?

Miss Myers: We made a motion to strike the counter claim because all of the points involved in it are already in the main case under consideration by the Court.

The Court: Here would be the legal situation. I either must not strike the counter claim or I must not strike the third defense, one or the other. They ought to be in the case somewhere.

Miss Myers: No, this is entirely based upon the 270 averment in the complaint and the second defense.

The Court: The averment of the complaint is on information and belief?

Miss Myers: What?

The Court: The averment of the complaint is on information and belief?

Miss Myers: No; it is a verified complaint, Your Honor.

Mr. Stein: The complaint admits we were engaged in purely intrastate business.

Miss Myers: We have always said they have been engaged in purely intrastate business. There has been no question about it from the beginning. It is a pure question of law there. The existing condition of the market is the fact that this handler is in competition with other handlers appears obvious and supports a motion for summary judgment in the case. All of the matters that coun-

sel has discussed for the last hour and a half practically could have been discussed in the complaint and the second defense. I may say that the Government is in accord with the Schechter case. which we often quote in support of the provisions of this order.

271 The Schechter case created no new laws, but established the law that has been found in numerous interstate cases for many years. The Court merely found that the inference to interstate commerce was too remote. We do not agree with that. We say in this connection now—

The Court: Just wait a moment. I am trying to get the factual situation in my mind here. My impression was right about the allegation of your complaint, alleged upon information and belief that defendant purchased—which is located within the State of Illinois. This remark emphasizes and gives the Court some factual situation.

Miss Myers: If Your Honor please, the various affidavits in support of the motion for a summary judgment set forth the facts in connection with that.

The Court: I may have to get it from those affidavits.

Miss Myers: Yes. We will gladly submit this—

The Court: To be on the safe side, so the record will be all right I think I had better deny your motion to strike the third defense so we will have that in the case very clearly. I will deny the motion to strike the third de-

272 fense.

What is the fourth defense?

Mr. Stein: Now, the fourth defense, that is a very vital point. It turns on the question of whether or not the Secretary of Agriculture in promulgating the order had complied with the requirements of the law. In that connection we point out in that defense—

Miss Myers: This question has already been discussed at great length before Your Honor. The Court has already expressed his opinion. The question is purely an administrative one. It is correct.

Mr. Stein: That is the reason Your Honor has set us down for hearing.

The Court: I may jump the question on that. I would like to hear you argue.

Miss Myers: I suggest if we are going to go into this that actual facts be brought in, because Mr. Stein is not talking from any proof that he is offering in support of his contention.

The Court: He set it up in his argument, and set up certain facts in this defense, fourth defense. You have demurred to those facts. So whether this argument would be consigned to the facts which he sets up, it might or might not be true, but if I do not strike it, it would be a question of proof.

273 Mr. Stein: This defense, if the Court please, arises by reason of the requirement of the law under Section, Sub-sections 1 and,—or Sub-section 1 and 2 or Section 2, wherein it is provided that the Secretary that the base period upon which prices shall be fixed should be the so-called pre-war period.

The Court: State that again, please.

Mr. Stein: I will read the provision. Section 1 provides:

"Section 2. It is hereby declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base

274 period is the pre-war period, August, 1909 to July, 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August, 1909—July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August, 1919—July 1929."

In other words, at the time this law was passed—

The Court: Isn't there another provision of law for another base period?

Mr. Stein: Yes, Your Honor. I will come to that. I merely want to call Your Honor's attention at the time the law was passed the various prices were considered with regard to tobacco and potatoes that the farmers would receive and also the price then was contemplated under

the pre-war period price, and they took that out of
275 the general class and fixed the post-war period with regard to tobacco and potatoes and with regard to milk the price as fixed at that time when this law was passed in 1935 was the pre-war period.

Now, the second paragraph provides—the first one was in order to secure to the farmer satisfactory prices. They allowed this law to be entered into.

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

276 In subsection 1 the base period designated is the pre-war period and the prices that were paid by farmers, received by farmers the purchasing power as it was at that time.

Now, that section in that form refers purely to section 1, and to the base period, the pre-war period as the base period.

Subsequently an amendment, an additional provision was enacted, section 8.

"Sec. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post war period, August 1919-July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power
277 of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture."

Your Honor will note that under Section 8e the Secretary is required to do two things. He must first find that

he has not available statistics in the Department of Agriculture to ascertain the purchasing power during the base period, during the base period; namely, the pre-war period, 1909, 1909 to 1914, then he must proclaim that. He must set that forth in the order which I will discuss later as to why the order on its face is not in compliance with the law, because the findings that are required—

The Court: That is your fourth defense?

Mr. Stein: That is our fourth defense, yes, sir. The point there made is, first of all, it presents this point. Your Honor will see that Section 8e which I just read—

The Court: You are asking the Court, as I understand it, or the motion of a defendant, your are asking the Court to go into the economic inquiry as to the effect, the economic effect of the price during both base periods.

278 Now, the Court can't do that.

Mr. Stein: No. That raises the legal question, Your Honor.

The Court: It seems that the only factual question which could arise there, did the Secretary of Agriculture find and proclaim surveys. If he did, why the Court is bound by that.

Mr. Stein: No, Your Honor would not be bound. That would be subject to rebuttal testimony under the Supreme Court decisions, but on this point we allege that the prices fixed by the Secretary of Agriculture are prices which are in contravention to Section 2, sub-paragraph 2 of Section 2.

The Court: It seems to me, if I may interrupt, it seems to me this is purely an administrative proposition.

Mr. Stein: It can't be, because—

The Court: We can't go into the economics at this time.

Mr. Stein: Excepting this, Your Honor, Congress has said you did not authorize. There is no occasion under this title, which has for its purpose the maintenance of prices to farmers above the level which we designated

279 in sub-section 1, which is as set forth in the pre-war period. Now, this is a limitation—

The Court: Its power to find that fact is delegated to the Secretary of Agriculture, isn't it?

Miss Myers: Yes, certainly, yes.

Mr. Stein: He is delegated to find that fact, but we say this: To protect the interests of the consumer this section was passed. Congress there said, the consumers represented here and that is for the public interest.

Congress says this: We are passing this law for the benefit of the farmer, and in order to protect the consumer, and we want it understood that we will not authorize by this act nor want the Courts or anybody to construe the act as permitting or fixing any prices which is going to give the farmer more than he received during the war period.

Now, that is a limitation that is read into the entire law that is passed. There is no occasion under this law, at all for going back. Now, that is a matter that is purely for the Court. Certainly the Court would have a right to go into the case.

The Court: Q. What kind of an inquiry would the
280 Court make to ascertain that fact? The Court is not equipped to do that. In this particular case the Court would be sitting here for a year or two.

Miss Myers: No one ever, the Department of Agriculture has never been able to find those pre-war figures.

Mr. Stein: At least they are publishing records to the contrary.

Miss Myers: Oh no, not from the Department of Agriculture.

Mr. Stein: Pardon me.

Miss Myers: Stick to the truth once in a while.

Mr. Stein: I object to that question.

The Court: That is improper.

Miss Myers: I retract that statement, but I will prove that it was true when he introduces his compilation.

Mr. Stein: Now then, my point is this, Your Honor, on the face of this law, what Congress should have done is when they amended this by starting out, they should have changed sub-section 2, by changing the provision which refers to sub-section 1 as being the pre-war period,
281 which is the limitation, the very maximum the farmers may receive, the price. The point that I make is this: They do not say that we authorize a price to the farmer which will give him a price, which may be subsequently changed by the Secretary of Agriculture; but they say definitely he may not receive a price which will exceed the level which we will provide for by a subsequent one, and it is definitely set as to milk, which is not included in the tobacco and potatoes, which must be the pre-war period.

They may have intended to mean that in the event that the Secretary of Agriculture cannot definitely present the

true situation on that in view of this limitation and we allege that the prices that are actually fixed by the Secretary of Agriculture to the farmers are higher than those that he received during the pre-war period.

That, on the face of it, if that is true, and it is admitted on this motion, then the Secretary of Agriculture has no right to provide for a price which is going to give the farmer more than it was declared the policy of Congress, in order to protect the consumer, apparently a promise was made to the consumer at the time the law was passed,
282 that they would give to the Secretary of Agriculture an unlimited power to fix the price of milk and other commodities.

They said in this particular case to protect the interest of the consumer, we want it understood we do not authorize any act on the part of anyone in connection with this law whereby the farmer is going to get more than we say he should receive under Section 1.

In Section 1 they say the farmer shall receive only such prices as determined in connection with the provisions of Section 1 and the base period is fixed as 1909 to 1914. We allege that the prices that were paid to the farmer during the pre-war period were $1.50, and that this provides for considerably more. And we say that on the face of it the act of the administrator, the act of the secretary in promulgating these prices is directly at variance and contrary to the authorized acts and the intent of Congress, and the Court has the only power that can stop the usurpation of power for the protection of the consumer and the intent and the purpose with which the law was passed for the protection of the general public.

283 Your Honor can see that at the time this law was passed there were undoubtedly consumers, the public was wondering what are they going to have to pay for milk or these other products they had intended to be covered by this law.

Congress says, yes, we are going to let the farmer receive a fair price for his commodity, but we will not authorize, we want it understood that this does not—there is no action under this title which has for its purpose the maintenance of prices to the farmers above the level which we now designate as being the pre-war price. In other words, that promises the public, the consumer, that while the Secretary of Agriculture may adjust the prices to the farmer for his

benefit, that promises you no action will be taken under this law which will result in that the farmer will receive one cent more than what he received during the pre-war period.

We allege here, as a matter of fact, the prices that are fixed by the Secretary of Agriculture are considerably higher than the prices that were paid to the farmers for the identical commodity during the pre-war period;
284 and therefore, we say the entire order is void, because it is in controversion of the expressed provisions of the law that the prices be fixed overnight, say, and may not exceed the prices that were designated and received by the farmer during the base period, except to such modification as it appears in the first portion of that section.

The Court: Well, now the Court is not going into the economic end of it, so the motion will be sustained as to the fourth defense. We will take a recess until two o'clock.

Mr. Stein: Now, in that connection, Your Honor, we propose to show by their own records which they will undoubtedly introduce in evidence here that these prices were known to the Secretary of Agriculture.

Miss Myers: If Your Honor please, the prices were not. No pre-war prices were, because surveys instituted by the Bureau of Agriculture and Economics, which publishes those prices was not begun until 1918. No milk order enters into a pre-war period because they simply had no figures until after 1918.

The Court: Let us cross that bridge when we get
285 to it.

Miss Myers: You are going back to the same old bridge.

(Whereupon at 12:30 P. M. a recess was taken until 2:00 o'clock P. M. of the same day, being Tuesday, October 29th, 1940.)

286 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1211)

Tuesday, October 29, 1940.
2 o'clock P. M.

Court convened pursuant to recess.

Present:

Mrs. Mary Connor Myers and John A. Looby, Jr., On behalf of the Government.

Mr. Alvin D. Stein, On behalf of the defendant.

287 The Court: Now, your Fifth Defense.

Mr. Stein: The Fifth Defense—

The Court: That has been decided by the Supreme Court of the United States and I am not going to waste time on that.

Mr. Stein: Except, your Honor, on one phase of it. We object to paragraph 610 (c), which delegates to the Secretary of Agriculture under the authority and with the approval of the President—the Secretary of Agriculture is given unlimited authority by and with the approval of the President "to make such regulations, with the force and effect of law, as may be necessary to carry out the powers vested in him by this chapter." And further provides that "Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein." That phase of it was not passed upon.

The Court: Well, I will sustain the motion to dismiss as to that. Now the Sixth.

Mr. Stein: The Sixth is the question of this unlawful confederation and pool, in violation of the anti-trust laws of the United States.

The Court: Well, a later law may be in conflict with a former law anyway. So I will overrule the Sixth.

Mr. Stein: Except this, your Honor, if I may be permitted: I cite in my brief in opposition to the motion
288 to dismiss in opposition to the summary judgment case, *United States* v. *Socony Vacuum Motor Company*, recently decided in the United States Supreme Court, where a certain defendant sought to secure relief by reason of the fact they were acting under the direction of N.R.A. officials

and the Supreme Court there pointed out that even if they had their consent that that would not relieve them of the criminal liability of the agreement under the anti-trust law, which emphasized the point that I make, that here is a situation where the Government is seeking to compel the handler to become a party to a pool against his wishes and at the same time jeopardizes his rights and makes him subject to the anti-trust laws of the United States and possibly to criminal prosecution.

The Court: I will overrule the Sixth. I will sustain the motion as to the Sixth defense, and as to the Seventh.

Mr. Stein: Now, with regard to the Eighth Defense, that I think is a question of fact with regard to the producers.

The Court: That is a matter that the Government will have to prove, so I sustain the motion as to the Eighth Defense.

Mr. Stein: You sustain that?

The Court: Yes, sure.

289 Mr. Stein: Well, excepting this, your Honor, the point there made is that the order of the administrator—of the Secretary, arbitrarily limits the producers to those who can comply with that requirement, and having that plant approved by some health authority, or which may be approved by the Secretary of Agriculture,—which unduly limits the definition of producers contrary to the general law applicable thereto.

And I further point out that the definition of producer in the Act is so indefinite and uncertain that it is unenforcible, in that it provides that the term "producer" means "any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such plant."

Now, I say there is nothing in the law which permits the market administrator to become a judge of a farm and determine for himself as to whether or not the milk produced on such farm can come into the City,—or into this particular area. It limits it to some health authority, does not say whether state, federal or local or otherwise; simply
290 that it must be approved by some health authority or by the Administrator under the provisions of this law,

and he has the unqualified right to determine whether or not such a plant is approved. And I maintain there is no warrant in the Act which would warrant us giving the authority to the Market Administrator to limit the definition of a producer, who shall be a producer and who shall be entitled to vote.

In other words, under this definition, in addition to any plant which is approved by a health authority, there may be others that the Market Administrator in his wisdom, or caprice, or otherwise, can determine ought to be permitted to participate in the plan.

The statute, the Act itself is clear; it must apply to all producers in the territory who either sell in that area or offer products in that area; and there should not be any limitation or any right in the Market Administrator, who is simply an appointee of the Secretary of Agriculture, to have the discretion to determine who shall be considered a producer,—health requirements or not to the contrary notwithstanding. And I say as a matter of law, the objection in regard to that provision is a vital one in determining not only who was entitled to vote but in the administration of the entire Act. And I say the law is too indefinite
291 when it says it may be approved by any health authority who may or may not be a legitimate, duly authorized authority either under federal laws, state laws, local laws—it does not say which. And that defense is sought to raise that question as a question of fact or law; and it is broader than merely the question whether they had a right to vote on the election or not, but goes to the interpretation of the law.

The Court: I will sustain the motion as to the Eighth. Now the Ninth.

Mr. Stein: The Ninth is on the question of referendum.

The Court: That is superfluous. I will be justified in sustaining that because it also involves a denial. Ninth sustained.

Mr. Stein: The Tenth is a question of arbitrarily limiting the area.

The Court: I indicated clearly before that as to the tenth defense it would be sustained.

Mr. Stein: The 11th is a question of policy which your Honor has indicated.

The Court: I sustain it as to the 11th.

Mr. Stein: We have a 12th defense.

The Court: Now, all these conterclaims I think are involved in the main case anyhow; and under the new rules on counterclaims I don't think that ought to be inserted.

292 So I sustain the motion as to the counterclaim.

Mr. Stein: No, your Honor, I want to be heard on that. Counsel has entirely misquoted the rules on counterclaim.

The Court: What do you pray for? You pray for a counterclaim and you want an injunction.

Mr. Stein: An injunction, your Honor, and that procedure has been approved in this District and in other districts. *United States* v. *Greenwood Dairy Farms*, 8 Fed. 398.

Mrs. Myers: All cases before three-judge rules statute was passed.

Mr. Stein: With regard to the three-judge rule—

Mrs. Myers: —in 1935.

Mr. Stein: That has nothing to do with the proposition with regard to the sufficiency. Under the Civil Procedure Act the law requires us to file what is known as a "compulsory counterclaim." A pleading was stated as a counterclaim in a claim not the subject of a pending action. That is, where the claim is already pending in another court, which at the time of the filing the pleader has against another party, if it arises out of a transaction or occurrence that is the subject matter of opposing party's claim and does not require for its adjudication the pleading of the third party of whom the court acquires jurisdiction.

293 Now that is the action counsel relied upon and clearly has no application to the case.

Mrs. Myers: I relied on Section 13-b.

Mr. Stein: I am just going to read that, if you don't interrupt me.

Mrs. Myers: I am sorry.

Mr. Stein: "A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or record that is the subject matter of the opposing party's claim, for the compulsory counterclaim."

For the compulsory counterclaim you are required to set up nothing that has occurred out of the transaction; but you may under 13-b state a counterclaim which did not arise out of the cause of action. Now, clearly that counterclaim is proper, because if your Honor should sustain our con-

tentions herein and dismiss the action, we would be entitled to an injunction to restrain the Secretary of Agriculture permanently from bringing any action against us on this order, not only on his claim, but permanently
294 for an injunction, which was the practice that was adopted, and has been adopted in these courts.

Now insofar as the requirement that there is a three-judge situation, in my brief I point out a number of cases to the effect that a three-judge court is not necessary under the Judicial Code where the parties attack administrative regulations and actions and orders thereunder. And I call your Honor's attention to the following cases: *William Jameson & Co.* v. *Morgenthau, Secretary of the Treasury,* 307 U. S. 171; *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 304 U. S. 243.

In *Hudson & Manhattan Co.* v. *Hardy,* 22 Fed. Supp. 105, it was held that

"A suit to enjoin the enforcement of an order of the National Mediation Board is not one requiring a three-judge court, because it is not an attack upon an Act of Congress."

Under your Honor's ruling the question of the constitutional objections to the law has been obviated. The question now before your Honor under this order and upon which the case now proceeds, as I understand it, is as to the legality of the order under the law,—whether it conforms to the law, and if that be the case, if your Honor
295 should find that the order does not conform to the law we would be entitled to an injunction to restrain the Administrator from thereafter further harrassing us or otherwise, and a three-judge court would not be proper or necessary in a case of that kind, and even if it were, the Supreme Court has in a recent case decided that where certain facts are to be decided by a one-judge court and certain facts by a three-judge court, that under the rules of the civil procedure the court has a right to segregate the trial of the case with regard to those issues. So it would not be remiss in any way if the Court should determine that a three-judge court is necessary (which I think it is not, under the law) that the matter of the counterclaim should be heard by the three-judge court and the matter of the original complaint by your Honor. But I think the entire matter is subject to your Honor's jurisdiction, because in this case we are simply attacking the validity, at this time, as the case now stands, on the matter of the order itself,

and whether it complies with the law. That does not involve the constitutionality of the Act. In that way the
296 case I referred to your Honor, *Pittsburgh & West Virginia Railway Company* v. *United States, et al.*, 281 U. S. 479, wherein suit was brought in the District Court against Interstate Commerce Commission and the United States and others, the purpose of the suit is two-fold: (1) to set aside a similar order of the interstate commerce commission; and another for relief against the other defendant. Hearing was had by a three-judge court. The three-judge court declared the question involving the other defendant was not properly before it as a three-judge court. Bill was dismissed as to both classes of relief. The bill was not properly before it as a three-judge court; but since the Court had jurisdiction and a District Judge was called in and had concurred in the judgment, the Court passed all.

In other words, it is not such a fixed and arbitrary matter under the rules of civil procedure permitting segregation in trial of cases, that that would not be an objection to the counterclaim. I think the counterclaim on its face,—if any of the grounds we rely upon are good—then the order should fall, and we would be entitled to, as a matter of equity, an injunction to restrain any further bringing
297 of actions as against us under this order, which as to us would be void.

The Court: I will withhold the ruling on that.

Mrs. Myers: May I say one thing, your Honor: It is the Government's contention that the type of claim necessary to support a counterclaim such as defendant has filed must support an action based upon any regulation of the executive department and must be a claim based on any law of congress. This regulation, order 41, does not create any claim at all. The regulation itself in order to support the defendant's position, must create a complete claim, or must guarantee to the defendant something in consideration of his first doing some thing. The regulation of the Secretary of Agriculture in relation to the Chicago marketing area does not create any such claim at all.

Mr. Stein: It either creates a claim which is enforcible by court order and which requires the defendant to make money payments to the market administrator, or does not mean anything at all.

The Court: Well, I will withhold my ruling. Now let's take some testimony.

298 Mrs. Myers: May I ask this, your Honor, when withholding ruling—to which counterclaim?

The Court: On the motion to strike the counterclaim.

Mrs. Myers: The defendant in this case has attacked the validity of Chicago order No. 41. The complaint states the order was published in the Federal Register and gives the volume, page and date. Under the provisions of the Federal Register Act, approved July 6, 1935, Title 44, U. S. C. A. Section 307:

"The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original."

Also the same section provides that the contents of the Federal Register shall be judicially noticed.

The burden of proof, under the provisions of the Federal Register Act, is upon the defendant in this case to show that the order published in the Register is in-

299 valid; and the finding of the Secretary of Agriculture concerning the referendum must be accorded the presumption of correctness and validity; and the defendant has the burden of proof if it seeks to rebut that presumption.

Denver Union Stock Yard Co. v. *United States*, 57 Fed. (2d) 735.

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176, 185.

The Government contends that the burden is on the defendant in this case to show that the order is invalid.

Mr. Stein: Do I understand that is the Government's case?

Mrs. Myers: That is my case. It is up to you.

Mr. Stein: Do you contend that that relieves you of proving it?

Mrs. Myers: Yes, that that creates a presumption of validity and relieves me of proving it; and that has been held in several cases.

The Court: Does the Government rest?

Mrs. Myers: Yes, your Honor.

Whereupon the Government rested its case in chief.

300 The Court: Anything further for the defense.

Mr. Stein: Just a minute now.

The Court: What is the citation of that case you read from?

Mrs. Myers: 44 United States Code Annotated, Section 301, et seq.

The Court: Title what?

Mrs. Myers: Title 44, and the particular section I am reading from is 307. If your Honor would care for a copy of that and the citations, I have an extra copy (handing paper to the Court) the part that I read is about half way down that long paragraph.

Mr. Stein: If the Court please, in regard to this particular citation—

The Court: Before we argue it let's get all the evidence in.

Mr. Stein: Well, I presumed that the Government was going to introduce the testimony that was heard in regard to the various steps required under the law. The particular statute counsel refers to does not mean that a document that is recorded in that way shall be evidence of all the preliminary steps that are required, when on the face of it the requirements have not been complied with.

301 Mrs. Myers: It creates the presumption, a rebuttable presumption.

Mr. Stein: Only as to the document having been passed as it purports to be, but not as to the contents contained in it. It amounts to nothing but a public notice of what was contained therein as being public notice, but it does not establish that the recitals in the documents themselves are evidence of any more than that the public has notice of it and not of the conditions themselves.

Mrs. Myers: In 1938 Opinion of the Attorney General, page 359, rendered October 29, 1935, the attorney general said:

(Counsel read from said opinion as follows: "I
302 call the attention of counsel to several cases in connection with what is meant by a "presumption". It has been held that it makes a prima facie case for the party in whose favor it exists. *Smith* v. *Tompkins* (a Rhode Island case); *Honroth* v. *New York Life Insurance Co.*, 275 N. W. 258. And presumption creates the necessity for the opposing party to supply evidence meet the prima facie case; so that the presumption will prevail. *Brown* v. *Brown*, 160 U. S. 149.

"A presumption operates to relieve the party in whose favor it operates from going forward in argument or evi-

dence; and serves the purpose of a prima facie case until the other party has gone forward with his evidence."

Christiansen v. *Hilber*, 276 N. W. 495.

(Citing cases.)

The Court: Well, the Government has rested now.

Mr. Stein: I submit, if the Court please, I am taken by surprise. If that is the law, which I doubt—

Mrs. Myers: He cannot be surprised, your Honor. I raised this the first time I was over here.

The Court: It seems to be pretty clear. "Publication in the Federal Register shall create a rebuttable presumption." I don't see how they can get around that.

Mrs. Myers: They cannot, your Honor.

Mr. Stein: Have you the records here of the published lists and notices?

303 Mrs. Myers: I have documents, lists and—

Mr. Stein: And the various notices that were given?

Mrs. Myers: Yes.

Mr. Stein: I would like to have them, please. I will call the market administrator. What is his name?

Mrs. Myers: The market administrator's name is Andrew W. Colebank and he is out of the City.

Mr. Stein: Is there anyone here representing the Administrator?

Mrs. Myers: No witnesses have been called. What do you want the Administrator for?

Mr. Stein: I want somebody to identify these documents unless you agree to them.

Mrs. Myers: You have the records containing the certificates signed by the Secretary of Agriculture.

Mr. Stein: Are these all certified (indicating)?

Mrs. Myers: All certified by the Secretary and admissible under the Public Documents Rule without anything more. You don't need the Market Administrator. You don't need more than the certificate that appears there.

The Court: I will let you look over that a few minutes then I will be back.

(Short recess taken.)

Mr. Stein: Mrs. Counsel, do I understand that these volumes and these documents here constitute the entire record that pertain to Order No. 41?

304 Mrs. Myers: Yes.

Mr. Stein: If the Court please, in view of the admission made by counsel I now offer in evidence on behalf

of the defendant the three books here, and ask that they be marked as Defendant's Exhibits 1, 2 and 3. And this one as Exhibit 4.

(Said four books were marked as "Defendant's Exhibits 1, 2, 3 and 4, respectively.)

The Court: Any objection to the offer?

Mrs. Myers: None, your Honor.

The Court: They may be admitted in evidence.

(Said four books were then received in evidence as DEFENDANT'S EXHIBITS 1, 2, 3 and 4, and same are returned with this transcript as a part of the record.)

Mr. Stein: These, I understand are all records which show what was done by the Department in connection with Order number 41?

Mrs. Myers: Yes.

Mr. Stein: And the defendant rests.

The Court: You don't mean that?

Mr. Stein: These records show on their face, if the Court please, I am prepared to point out, that they do not comply with the law.

305 The Court: You are not going to offer anything further on your Third Defense?

Mr. Stein: Oh, there is one thing more that I want to offer in evidence. These documents purport to show who they sent notices to and in that connection I want to offer in evidence the more definite statement of plaintiff's claim in accordance with Order of Court, filed in this case, showing the tentative approval of the Marketing Agreement that was supposedly sent to the producers and the notices and the letters that were mailed in connection therewith. Now that record (indicating)—

Mrs. Myers: May I see what you are offering?

Mr. Stein: Yes (handing papers). That is the thing that you filed in this case. It is a part of the pleadings in the case.

Mrs. Myers: You are not offering a pleading, are you?

Mr. Stein: Well, you filed it as part of the pleadings.

Mrs. Myers: No objection.

The Court: It may be admitted.

(Said document was marked Defendant's Exhibit 5, and same is in words and figures as follows:

306 Mr. Stein: Now, in regard to the interstate commerce proposition, in view of the fact that the plaintiff has rested and failed to introduce any evidence in re-

spect to any obstruction or any interference, directly or otherwise with interstate commerce, I think under the issues it will not be necessary for the defendant to introduce any evidence other than the facts admitted and found by your Honor as being admitted in this case.

The Court: I have reference to your third defense; if you are going to abandon it I will strike it out.

Mr. Stein: The third defense is the interstate commerce—You mean that is with regard to interstate commerce?

The Court: If this case goes up what I want in the record—I was told in the argument that the Court does not take judicial notice of the debate, and it may be admissible under that third defense—

Mr. Stein: Oh, I thought I had introduced this. I will introduce this, I had assumed I had already done so. I offer in evidence House Report No. 1240—1241 rather, 74th Congress, First Session, appearing in House Reports on Public Bills, Volume 3, 74th Congress, First Session; Senate Report.

Mrs. Myers: What page is that, please?

Mr. Stein: It is right—

307 The Court: Is the document numbered?

Mr. Stein: Yes, Report No. 1240, 74th Congress, First Session.

Mrs. Myers: Is it 1240 or 1241?

Mr. Stein: I meant 1241. I had the wrong page here. I offere in evidence Senate Report No. 101, 74th Congress, First Session, Market Calendar No. 1058, appearing in Senate Report on Public Bills, Volume 3, 74th Congress, First Session, Book No. 98, and ask leave to read it into the record without copying it.

Mrs. Myers: May I take a look at it?

Mr. Stein: Yes, sure. I also offer in evidence Report No. 808 of the House of Representatives, 74th Congress, First Session, promulgated April 30, 1935, and appearing in Volume 2 of House Reports on Public Bills, 74th Congress First Session.

Mrs. Myers: No objection to 1241, the House Report.

The Court: You say no objection?

Mrs. Myers: No objection.

The Court: It will be admitted.

Mrs. Myers: No objection to any of them.

Mr. Stein: I now offer in evidence from Volume 79,

paragraph 10 of the Congressional Record, 74th Congress, First Session, pages 11,135, 11,136 and 11,239.

Mrs. Myers: I object to the admission of the de-
308 bate, your Honor, on the authority of the Duplex *vs.* Deering case, which the defendant cited himself this morning.

The Court: I will overrule it. It may be admitted.

(Thereupon the various exhibits just offered by counsel for defendant, were admited in evidence, marked as such exhibits and are in words and figures as follows:)

309 DEFENDANT'S EXHIBIT "A".

Calendar No. 1058

74th Congress)	Senate	(Report
1st Session)		(No 1011

Amend the Agricultural Adjustment Act, and for Other Purposes.

May 13 (calendar day, July 3), 1935.
Ordered to be printed.

Mr. Smith, from the Committee on Agriculture and Forestry, submitted the following

Report.
(To accompany H. R. 8492)

The Committee on Agriculture and Forestry, to whom was referred the bill (H. R. 8492) to amend the Agricultural Adjustment Act, and for other purposes, having considered the same, recommend that the bill do pass with amendments.

General Statement.

The amendments to the Agricultural Adjustment Act contained in the bill H. R. 8492 are needed in order to carry out two principal purposes. The first is to permit the agricultural adjustment program to contribute its full share toward recovery by supplementing the present provisions of the act so as to enable it to operate effectively

in achieving its objectives. The second is to insure
310 that the program will be carried out within the limits of the powers given Congress under the Constitution, and to make certain that the authority conferred upon the Secretary of Agriculture under the Agricultural Adjustment Act will conform to the principle that power cannot be delegated by Congress to an executive officer unless adequate standards and guides are prescribed by Congress to govern the exercise of such power. * * *

The proposed amendments, insofar as they relate to marketing agreements and orders, are primarily intended to implement and spell out in more detail and with greater freedom from ambiguity the powers which were intended to be conferred in the original act. The present language of the statute is subject to misconstruction which has given rise to obstacles in connection with the enforcement of marketing agreements and licenses and has seriously endangered their successful operation. Under the proposed amendments, it is made clear that the Secretary must issue an order whenever the handlers of 50 percent by volume of the commodity to be covered in the order have signed a marketing agreement regulating the handling of such commodity in the same manner as the proposed order, or, failing the signature of such handlers, whenever the Secretary, with the approval of the President, finds that two-thirds by volume or number of the producers of the commodity covered by the order favor its issuance and that its issuance is the only practical means of advancing the interest of such producers pursuant to the declared policy. The orders can be made applicable only to specified commodities, and can contain only such terms and conditions as are expressly authorized in the proposed amendments. Furthermore, the amendments contain provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power con-
ferred upon the Secretary. Specific example of pro-
311 ducers, and, except in the case of milk and its products, a partial exemption of retailers from the power to issue orders, has been provided for.

A congressional policy that orders shall be limited in their application to the smallest practicable region, and that they shall contain different terms applicable to different areas, has been carefully spelled out. These and other restrictive provisions are, in the opinion of the com-

mittee, adequately drawn to guard against any fear that the regulatory power is so broad as to subject its exercise to the risk of abuse. • • •

An exposition of each of the important features of the bill is set forth below with appropriate headings.

Parity Price.

The declaration of policy in the Agricultural Adjustment Act has as its objective the reestablishment of prices paid to farmers at a level that will give agricultural commodities a current purchasing power equivalent to that of the base period. Section 1 (a) of the bill amends this provision of the act to provide that, in the case of all commodities for which the base period is the pre-war period (August 1909 to July 1914), such prices will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate as contrasted with such payments during the base period. This provision is intended to give the Agricultural Adjustment Administration a more adequate standard for determining parity prices. The present method of calculation is composed of an index of prices for goods which farmers buy in relation to the pre-war level and does not cover expenditures for taxes and for debt service. At the present time, taxes per acre and mortgage interest per acre are probably about 160
312 to 170 percent of the pre-war level. The combination of these two items, together with the index of prices paid by farmers, may be expected to give parity standards approximately 5 percent higher than at present. The corresponding amendment to section 9 (c) of the act, which defines parity price, is made by section 13 of the bill. It is there provided that this amendment shall not affect the rates of any processing taxes now in effect, and shall not require their adjustment until the Secretary finds such adjustment necessary in accordance with standards prescribed in the act.

Declaration of Policy—Consumer's Interest.

Certain changes have been made by section 1 (b) of the bill to the declaration of policy contained in section 2 of the present act in order more clearly to delimit the scope of the Secretary's authority under that section. Sub-

section (3) of the declaration of policy in the present act, which was inserted in order to protect consumers against unwarrantably rapid or excessive price increases, is ambiguously worded and has met with some criticism from the courts as being a vague and unintelligible standard, from which the Secretary can derive no adequate guide in the exercise of his powers. This language has, accordingly, been reworded to make it clear that the act confers no authority upon the Secretary to utilize his powers with the purpose of maintaining farm prices above the parity level.

Rental and Benefit Payments and New Programs.

• • • The provisions of section 8 have been rewritten for the further purpose of making certain that, in the exercise of the powers conferred under that section the Secretary of Agriculture is bound by definite rules laid
313 down by Congress, acts only in pursuance of findings of fact made after investigation, and puts into effect action set forth in the statute and determined on the basis of the finding made by him. These provisions of the bill thus conform in every respect to the requirements laid down in the Schechter case. Before exercising any of the powers granted with respect to any commodity, the Secretary must determine that the current average farm price of the commodity is, at the time of such determination, below the fair exchange value thereof, or that the average farm price of the commodity, for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, is likely to be less than its fair exchange value. The Secretary must undertake an investigation concerning the existence of these circumstances whenever he has reason to believe that they exist. If he finds, upon the basis of the investigation, that they do exist, he is directed to undertake the exercise of such of the powers conferred by section 8 as are administratively practicable and best calculated to effectuate the declared policy. The Secretary is directed to cease exercising such powers after the end of the marketing year current when he determines, after investigation, that the circumstances described above no longer exist, except (as provided in the committee amendment) insofar as the exercise of any of such powers is necessary to carry out

obligations assumed by him prior to his proclamation discontinuing the exercise of the powers. * * *

Marketing Agreements and Orders.

Section 5 of the bill eliminates the present licensing section (sec. 8 (3) of the Agricultural Adjustment Act, and in lieu thereof authorizes the Secretary of Agriculture to issue orders covering the marketing and distribution of specific agricultural commodities. Because the provi-
314 sions of the present law for administrative revocation have been eliminated in the proposed bill, the term "license" has been discarded, and the term "order," in general usage with respect to administrative regulations, such as those of the Interstate Commerce Commission and of the Federal Trade Commission, has been substituted. To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter et al* v. *United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing, and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities. The powers to be exercised under the proposed bill are confined within the limitations upon the Federal authority over interstate commerce as expressed by the Supreme Court in the Schechter case and other cases. A comparison of the proposed provisions and the present law, and a detailed discussion of the proposed provisions with respect to orders, is set forth below. * * *

The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce or to the handling thereof which directly burdens, obstructs, or affects interstate or foreign commerce in such commodities or products thereof. Section 8 (2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof "in competition with" interstate or foreign commerce. This phrase has been omitted from the proposed section 8c (1) of the bill which deals with orders, as well as from the proposed

section 8b, which deals with marketing agreements,
315 because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.

Second. Specific provisions governing the Secretary of Agriculture in determining when to issue and in issuing orders are included in the proposed bill in paragraphs (8) and (9) of section 8c. Orders may not become effective until the handlers of not less than 50 percent of the volume of the commodity to be covered by the proposed order have signed a marketing agreement which regulates the handlers in the same manner as the proposed order. But when such a marketing agreement has been signed, if the Secretary finds that the issuance of an order would tend to effectuate the declared policy with respect to the commodity and transactions covered in the order, the Secretary must issue an order. Without such consent of the handlers to be covered thereby, a proposed order may become effective only if the Secretary of Agriculture, with the approval of the President, finds (1) that the failure of the requisite number of handlers to sign a marketing agreement, upon which a hearing has been held, tends to prevent the effectuation of the declared policy; (2) that the issuance of the proposed order is the only practicable means of carrying out the declared policy; and (3) that the issuance of the proposed order is approved or favored by at least two-thirds, by number or volume, of those producing the commodity for market. But, if the Secretary finds that these facts exist, he must issue an order, notwithstanding the failure of the required number of handlers to sign the marketing agreement. An order issued without such consent of the handlers to be covered thereby may not, except in the case of milk and its products, be applicable to any person selling agricultural commodities at retail in his capacity as a retailer, nor may it in any case be applicable to
316 any producer in his capacity as a producer.

So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable regional production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas

as will recognize local production and marketing differences. Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable regional production or marketing areas.

Prior to the issuance of any order, the Secretary of Agriculture is required to give notice of and an opportunity for hearing upon the provisions of a proposed order. Only those terms may be included in an order which the Secretary finds from the evidence introduced at the hearing will effectuate the declared policy of title 1.

Third. Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8 (3) of the Agricultural Adjustment Act. Such orders may contain provisions classifying milk in accordance with the purpose for which it is used, and may fix, or provide a method for fixing, minimum prices which shall be paid by handlers to producers for milk in each use classification. This provision makes it possible to take into consideration, in orders dealing with milk, the difference in value between milk sold for consumption in
317 fluid form and that used in the manufacture of such products as butter, evaporated milk, etc. * * *

Cooperation with States.

Section 18 adds to the section of the present act which gives the Secretary of Agriculture miscellaneous powers a new subsection which is designed to provide for cooperation between the Secretary and State agencies. This power probably exists under the present law, but it is deemed advisable to make specific provision for it. The new subsection directs the Secretary, upon the request of duly constituted State authorities, to confer and hold joint hearings with State authorities, and authorizes him, whether or not such request has been made, to cooperate with, avail himself of the services, records and facilities of duly constituted State and Territorial authorities, and to issue orders under the provisions of section 8 (c) of the act complementary to orders or other regulations issued by the

State authorities. This authorization is to carry out the declared policy of the title and looks to securing voluntary uniformity in the formulation, administration, and enforcement of State and Federal programs relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products.

The Secretary is also authorized to make available to the State authorities records and facilities of the Department of Agriculture. Information furnished to the Secretary pursuant to the books and records section inserted in the present act by the bill is to be made available to such authorities only to the extent that such information is relevant to transactions within their jurisdiction. The authorities are required to agree that the information so furnished them shall be kept confidential in a manner
318 similar to that required of Federal officers and employees under the books and records provisions.

Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the field of the States, for the limitations of the act and the Constitution forbid Federal regulation in that field, and this provision does not indicate the contrary. Nor is there anything in the provision to force States to cooperate. Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other.

319 DEFENDANT'S EXHIBIT "B".

House of Representatives.

74th Congress) (Report
1st Session) (No. 1241

Agricultural Adjustment Act Amendments

June 15, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Jones, from the Committee on Agriculture, submitted the following

Report
(To accompany H. R. 8492)

The Committee on Agriculture, to whom was referred the bill (H. R. 8492) to amend the Agricultural Adjustment Act, and for other purposes, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

The Portions of the Document Heretofore Set Forth as Defendant's Exhibit "A" Are Identical With This Exhibit "B" and Are Hereby Incorporated by Reference and Expressly Made a Part Hereof.

320 DEFENDANT'S EXHIBIT "C".

House of Representatives.

74th Congress) (Report
1st Session) (No. 808

Agricultural Adjustment Act
Amendments

April 30, 1935—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Jones, from the Committee on Agriculture, submitted the following

Report
(To accompany H. R. 7713)

The Committee on Agriculture, to whom was referred the bill (H. R. 7713) to amend the Agricultural Adjustment Act, and for other purposes, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

General Statement.

The proposed amendments to the Agricultural Adjustment Act are needed primarily in order to supplement the present act in such a way as to permit the Agricultural Adjustment Program to be made more effective. The primary objective set forth in the declaration of policy in the Agricultural Adjustment Act is to secure parity prices for farm products through balancing production with con-
321 sumption. This goal is obviously of vital importance in the recovery program. The restoration of farm buying power to its pre-war level will substantially assist in bringing about general improvement in business conditions. * * *

Analysis of the Bill.

Section 1 (a) amends the declaration of policy in the Agricultural Adjustment Act, which has as its objective the reestablishment of prices paid to farmers at a level

that will give agricultural commodities a current purchasing power equivalent to that of the base period. The amendment proposes that, in the case of all commodities for which the base period is the pre-war period (August 1909 to July 14), such prices will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate as contrasted with such payments during the base period. This section is intended to give the Agricultural Adjustment Administration a somewhat more adequate standard for determining parity prices. The present method of calculation is composed of all index of prices of goods which farmers buy in relation to the pre-war level, and does not cover expenditures for taxes and for debt service. At the present time, taxes per acre and mortgage interest per acre are probably about 160 to 170 per cent of the pre-war level. The combination of these two items, together with the index of prices paid by farmers may be expected to give parity standards approximately 5 percent higher than at present. • • •

Section 2 amends subsection (1) of section 8. • • •

The proposed provisions differ from the present law in several respects and add several new powers and limitations. A comparison of the proposed provisions and the present law and a detailed discussion of the proposed provisions are set forth in the numbered paragraphs below:

• • • •

322 Fifth. The new provision adds to the present law a second new class of licenses herein called "clause (3) licenses." These licenses may be issued only to make effective a marketing plan set forth in a proposed marketing agreement on which a hearing has been held. They cannot apply to any basis agricultural commodity (or its products), as now defined, except that they can apply to milk and its products, tobacco, and sugar beets and sugar cane. They may be issued only after certain determinations are made by the Secretary with the approval of the President. There must be a determination that the failure or refusal to sign of persons handling more than 50 percent of the volume of business specified in the agreement tends to prevent the effectuation of the declared policy of the act. It must be found that the issuance of such a license is the only practical means of advancing the interests of the farmers producing the commodity. Finnally,

it must be found that two-thirds of the farmers producing the commodity for market, or the farmers producing for marketing two-thirds of the volume of the commodity, approve or favor the license. Provision is made under which regional licenses will be issued instead of national licenses, so far as practicable, and under which licenses will give due recognition to differences in production and marketing, or both, in different cases. No such clause (3) license can be applicable to a retailer in his capacity as retailer. * * *

Section 11 adds a provision to section 10 (b) of the Agricultural Adjustment Act which authorizes the Secretary of Agriculture to utilize the services of State and local committees and associations of producers. The amendments permit the Secretary to utilize the cooperative
323 associations of producers in connection with the distribution of payments for expansion of domestic or foreign markets. This section of the bill also requires the Secretary to accord such recognition and encouragement to cooperative associations owned or controlled by producers as will be in harmony with the policy toward them set forth in existing acts of Congress and will tend to promote efficient methods of marketing and distribution. It is not intended by this language to discriminate against other handlers, processors, or dealers, but it has been found from experience that the participation by local committees and associations of producers has been of material value in administering the program. * * *

324 DEFENDANT'S EXHIBIT "D".

Congressional Record.

74th Congress)
1st Session) Senate.
Part 10)

(Volume 79
(Pages 11135
(and 11136

Agricultural Adjustment Act
Amendments

"Mr. Tydings. It is the understanding of both the Senator from Iowa and the Senator from Wisconsin that the agreements and the orders issued by the Federal Government apply only to milk which is in interstate commerce, and do not under any circumstances apply to milk in intrastate commerce?

"Mr. La Follette. My understanding is that the phraseology in the bill—I am not sure that I can turn to it at once—insofar as it defines interstate and intrastate—

"Mr. Smith. It appears on page 10 of the bill.

"Mr. La Follette. As I have read it in each particular case, if a legal controversy arose, there would have to be an adjudication by the courts to ascertain into which classification the particular shipment in controversy fell. In other words, the court would have to find the fact as to whether or not it actually flowed in interstate commerce or tended to obstruct interstate commerce.

"Mr. Tydings. In order to bring the example before the Senate in a concrete way, let us suppose milk is pro-
325 duced in a State and sold within that State.

"Mr. La Follette. My interpretation would be that that would not fall in the classification of moving in interstate commerce, or flowing in interstate commerce, or directly burdening or obstructing interstate commerce.

* * * * * *

"Mr. Tydings: In my judgment, however, Mr. President, if milk originates in the same State where it is sold, it is intrastate commerce, and the Federal Government has nothing to do with that particular shipment of milk. The Senator from South Carolina (Mr. Smith) and the Senator from Nebraska (Mr. Norris) and the Senator from Idaho (Mr. Borah), as well as I, all agreed the other day that this was an interstate provision only, and I do not think that construction can be too greatly accentuated in this discussion, so that the Federal agency charged with administering this provision will not attempt to regulate intrastate shipments, when such shipments are not within the purview of the law.

"Mr. Borah: Mr. President, the language on page 10 'as directly burdens, obstructs, or affects interstate or foreign commerce,' is purely surplusage. It does not add anything whatever to the power of control by the Congress. It may be, that language having been used, that someone may assume it gives an additional control over intrastate commerce; but the court would have to determine for itself in each particular case whether intrastate commerce did directly affect or directly burden interstate commerce. In other words, the language herein, in my opinion, adds nothing whatever to the power of Congress.

* * * * * *

"Mr. Tydings: I agree completely to what the Senator from Idaho has said. My only reason for restating
326 the proposition is that if the Federal agency charged with the administration of this provision were to serve notice upon a producer of milk that the Federal Government had jurisdiction, the producer might be frightened into the belief that if he did not carry out the Government's order he might be fined or put in jail, or that something else might be done to him; and I want it known by this debate, reiterated over and over again, that if the Congress passes this proposed act it is presumed that those who are charged with its administration will not; in the case of an intrastate shipment of milk, attempt to issue Federal orders and thereby cause producers to be put to the expense of hiring lawyers to prove that the Federal Government has no right to do the thing which it is attempted to do.

* * * * *

"Mr. Tydings: I may say to the Senator from Iowa that even if intrastate milk did become commingled with interstate milk, insofar as the man who produced and sold in the same State is concerned, that would not affect his situation. But here is the point: As we all know, the twilight zone, which the Senator from Wisconsin just described, offers an opportunity for the Federal Administrators to issue orders to State shippers and producers of milk where the whole transaction is within a State, which will force them to go to law in order not to be bound in cases by the Federal decree. I want it distinctly understood that it is the sense of the Senate that those in charge of the administration of this provision will have no right to issue orders which will take over the government or control or the price-fixing or any other phase of the milk situation where the milk is produced and where it is sold always within the same State.

327 "Mr. Dickinson: The very purpose of the 'weasel' words to which the Senator from Idaho has just referred is to do the very thing the Senator from Maryland has said should not be done.

"Mr. Tydings: I quite agree with the Senator, but I want it made clear that the Senate does not interpret the provision in that way. Insofar as I know, no Senator upon this floor claims that the Federal Government has anything to do with milk which is produced and which is sold in the same State; and that ought to be the way in which the proposed act will be enforced."

* * * * *

Volume 79 Part 10 Congressional Record Page 11239:

"Mr. Bailey: I am making an inquiry only for information. I freely confess that I have had the very greatest difficulty in comprehending the pending bill in its details or as a whole. I have carried it around with me for several days.

"On the matter of the base price, the parity price, we are all in confusion. I wish to see if we can clear it up. I may be entirely wrong.

"We began in the Agricultural Adjustment Act in 1933 with the pre-war period parity, August 1909 to July 1914. That was the base and that was the standard of parity in the old act and the present law. But at the top of page 3 of the pending bill that standard is abandoned and a different standard is established. If that be true, I wish to know it; and if it be not true, I wish to be corrected; but I shall read the language.

* * * * * *

"It occurs to me that we are asked to establish a
328 new standard. Are we still on the old standard of 1909 to 1914?

Mr. Smith: Yes.

"Mr. Bailey: Then what is the meaning of this language?

"Mr. Smith: The terminology is interchangeable—'fair exchange value or parity.'

"Mr. Bailey: Would that be the fair exchange value as of now or the fair exchange value as of 1909-14?

"Mr. Smith: The fair exchange value as interpreted in terms of 100 cents of the farmer's purchasing price as it was in 1924.

"Mr. Bailey: But that took as the base 1909-14. This language is without dates, but I understand the Senator now to say that the base is still 1909-14. Is that correct?

"Mr. Smith: That is correct."

* * * * * *

329 Mr. Stein: Defendant rests.

Thereupon the defendant rested its case.

The Court: Any rebuttal?

Thereupon the Government introduced the following evidence in rebuttal:

Mrs. Myers: I call Mr. Krueger, please.

PAUL F. KRUEGER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mrs. Myers.

Q. Mr. Krueger, will you please state your full name, address and employment?

A. Paul F. Krueger, 4914 North Francisco Avenue, Chicago; the position is Chief Sanitary Officer of the Chicago Board of Health.

Q. You are assistant to Doctor Bundeson, President of the Board of Health?

A. Yes.

Q. Mr. Krueger, I show you this list and ask if you recognize it, and if you will tell the court what it is, please? (Handing paper to the witness.)

330 A. This is a list of the dairy farms supplying the City of Chicago with milk products in accordance with the ordinances of the City of Chicago, which supplied that milk at some time during the months of April, May and June of 1939.

Q. Was that list prepared under your direction?

A. Yes, it was.

Q. Who was the person immediately in charge of its preparation?

A. Mr. James Nolan was the man in immediate charge of its preparation.

The Court: Is that a file of your office?

Mrs. Myers: Yes, your Honor.

The Witness: (Continuing.) That record was made from card file records in our office of each producer supplying Chicago with milk and milk products under and in accordance with the ordinances of the City.

Q. Is this a copy of the ordinance that it follows? (Showing document to the witness.)

A. This is a copy of the ordinance that was in effect at the time that the list was made.

Q. At whose request was this list made?

A. The list was prepared at the request of the United States Department of Agriculture.

331 Mrs. Myers: I am going to offer this list in evidence, your Honor, but before I do I am going to call the man who was immediately in charge of the card file records.

The Court: Do you insist on that?

Mr. Stein: I would like to find out something about it,—like to ask the witness some questions.

Mrs. Myers: I have a letter from Doctor Bundeson but I don't have a certificate from him, so I have asked Mr. Krueger to come over.

Cross-Examination by Mr. Stein.

Q. Have you anything to do with the keeping of the records in the Department itself of the City of Chicago?

A. The records of the Sanitation Division are under my supervision, yes.

Q. Is this under your supervision (indicating list)?

A. The making of—

Q. The milk department?

A. Keeping of the records of the Milk Department is under my supervision, yes.

Q. These records that have been produced here, these are compilations that were made from other records in your office?

A. That is right.

332 Q. In other words, this does not purport to be an original record of your department?

A. No, that list was made from the original records in our department.

Q. And you didn't make that list that you produced here?

A. No, I didn't.

Mr. Stein: That is all.

Direct Examination (Continued) by Mrs. Myers.

Q. The records of your office are in the form of cards, are they not, Mr. Krueger?

A. Yes, we have card index—a card record system in use, and on that card we list each purchaser who was eligible to ship milk to Chicago, and that is kept in accordance with the ordinance, which requires each purchaser to operate under the supervision of the Public Health Department.

Cross-Examination (Continued) by Mr. Stein.

Q. When you say you have a list of all producers eligible to ship milk into Chicago, what do you mean by that?

A. Those purchasers who are eligible to ship milk and

cream into the City of Chicago as Grade A milk or cream, or certified cream or milk products in accordance with
333 the ordinance of the City of Chicago.

Q. Is there any milk products that come into the City of Chicago that is not used as Grade A or certified milk?

A. Yes, there is.

Mrs. Myers: I object to the question. The only milk with which we are concerned at the moment is the Grade A milk to be shipped into the City of Chicago for the purpose of being distributed as such.

Mr. Stein: One of the questions is whether or not all the producers were notified.

Mrs. Myers: If your Honor please, I told the Court some time ago that there are numerous producers of milk who do not ship into the Chicago area for the purpose of supplying the fluid milk demand; they produce the milk and sell it at various milk stations. These milk producers are not operating in the City of Chicago and have no concern in this Order, nor are we concerned with them.

Mr. Stein: We are prepared to argue that question.

The Court: If your position is correct it was part of your case and clearly the question you are asking this witness is not proper cross-examination.

Mr. Stein: Well, no objection was made. No, we contend, if the Court please, it is part of the plaintiff's
334 case, because the plaintiff must prove they have delivered proper notices and given the opportunity to the producers to vote at the election; that would not appear on the face.

The Court: At any rate it was not proper cross-examination.

Mrs. Myers: No.

Mr. Stein: It was brought out upon redirect of counsel when she asked him in regard to the last question.

The Court: Well, perhaps the testimony may be received subject to the objection. He may explain.

Mr. Stein: Well, if the Court please, it is material to the issues.

Mrs. Myers: It involves producers who have no connection with this milk, who are not forced to comply with the subject matter of the regulation.

The Court: I will take it subject to the objection.

Mr. Stein: Read my question.

(Question read.)

Mr. Stein: Q. What is that milk and what is it used for?

A. That milk is used for manufacturing purposes; it is manufactured into such products as bread, evaporated milk, cheese, butter, soups and other food products.

335 Q. And that milk comes into Chicago in the form of fluid milk?

A. Well, it may come in as fluid milk or as cream, or as concentrate or evaporated and similar products.

Q. That milk is not under the supervision of the Public Health Department, is it?

A. Up to a few months ago it was not under our inspection and supervision, for the reason that we had interpreted the language of our ordinance (which states that all milk and cream sold in the City of Chicago shall comply with the requirements of the ordinance) to mean milk and milk products sold as such to the final consumer. A few months ago that question was raised to the Board of Health, and the question was submitted to the Corporation Counsel of the City of Chicago, who advised us that the wording of the ordinance was such that it applied to all milk and cream, or milk and milk products brought into the City of Chicago, no matter what purpose it was used for.

Q. Well, in April, 1939, under the construction in your department milk which was used for manufacturing purposes was not inspected by the Health Department?

A. That is correct, yes sir.

Q. And this list that was prepared under your direc-

336 tion does not purport to give the names of the producers who furnished, or delivered milk in the City of Chicago for manufacturing purposes?

A. No, it does not include those farmers.

Q. Are there many farms of that type in Illinois?

Mrs. Myers: I object, entirely immaterial and irrelevant.

The Court: I am inclined to agree with you, but under the new rules I have to take it all. Let it go in subject to the objection.

Mr. Stein: Read the question.

(Question read.)

A. Well, I don't know the number of farms that are involved, because we haven't had them under our supervision.

Q. Do you know what volume of milk comes into the City of Chicago that is not Grade A or certified milk?

A. No, I don't have any of that information.

Q. Excepting that you know that there was a milk that was not under your supervision?

A. That is right.

Q. However, since the last few months you have included that under your supervision, have you?

A. Well, in accordance with the opinion—

337 Mrs. Myers: Your Honor, I object to that. It has nothing whatever to do with the case. We even have a new order—

The Court: Let it in subject to the objection. You will make more time if you let it in subject to the objection.

Mr. Stein: Q. Have you finished your answer?

A. Following the receipt of the opinion of the Corporation Counsel a number of questions were asked—further questions were asked of the Corporation Counsel, as to just how that should be enforced by the Board of Health, and inasmuch as we have not heard from the Corporation Counsel further we have not as yet made it effective.

Q. Now this milk that comes into the City of Chicago for manufacturing purposes, is that separately labeled? Is that labeled in any way?

Mrs. Myers: If you know.

A. Well, I am not in a position to say, because that is not under our supervision.

Mr. Stein: Q. Under your supervision was it, or it was not under your supervision at all?

Mrs. Myers: Well, I think—

Mr. Stein: Beg pardon?

Mrs. Myers: I think he explained that.

Mr. Stein: All right, that is all.

Witness excused.

338 The Court: Any redirect?

Mrs. Myers: That is all Do you still insist on having the clerk brought over?

Mr. Stein: No, I will waive that requirement—

Mrs. Myers: Or do you agree that is a list?

Mr. Stein: Oh, I presume that if the mailing clerk were here he would testify that this is a true and correct copy of the cards that they have, or had at that particular time, and that it was transcribed on this list. Is that right?

The Witness: Yes.

Mrs. Myers: That is all. If I called the clerk he would simply testify that this list was prepared under his direct supervision from the cards under his custody; they tran-

scribed the cards on to this list. If it please the Court, I offer as GOVERNMENT'S EXHIBIT 1 the list of producers prepared by the Chicago Board of Health, the producers being those shipping into the area during April, 1939.

Mr. Stein: April, May and June.

Mrs. Myers: April, that is, the witness said April, May and June, but April is the only month that we are concerned with, being the representative period.

Mr. Stein: Well, do I understand this man would
339 testify that these were the same for the months of April, May and June? I think that question ought to be determined.

Mrs. Myers: All right, we will call the record clerk.

Mr. Stein: I will recall Mr. Krueger.

PAUL F. KRUEGER, a witness for the Government, having been recalled for further cross-examination, testified as follows:

Recross Examination (Continued) by Mr. Stein.

Q. These names that appear in this document, did they appear on your records in April, 1939, all of them?

A. They would appear in either the month of April, May or June.

Q. In other words, some would appear and some might not, during these particular months?

A. They might or might not, yes.

Q. You took a three months' period in preparing this list?

A. Well, we covered those three months.

Q. In other words, some of the producers may have stopped shipping during the month of April and new ones may have come in in May or June?

A. That is correct.

Mr. Stein: That is all.

340 *Redirect Examination by Mrs. Myers.*

Q. Do I understand all of the producers who were shipping into this area during the month of April, 1939, appear on this list?

A. Yes, all of those appearing as shipping in in April would appear on that list.

Mrs. Myers: That is all.

Witness excused.

Mr. Stein: We object to the introduction, if the Court please, on the ground that it appears that this is not a complete list of all the producers of milk who shipped milk into the City of Chicago during the month of April, 1939.

Mrs. Myers: The witness has just testified to the contrary. If anything, this is a more reliable list than otherwise would have been concocted. The witness has just testified that all the milk producers shipping during that period will be on the list.

The Court: Objection overruled. It will be subject to the objection.

Mr. Stein: It is not an original document.

The Court: Received subject to the objection.

(Said List, Government's Exhibit 1, is in words and figures as follows:

341 The Court: Any other rebuttal?

Mrs. Myers: Yes, I would like to call Mr. Connor, please. Before Mr. Connor testifies I would like to say to the Court that a copy of the Rules and Regulations of the Chicago Board of Health appear in the record of the public hearing, and I call the Court's attention particularly to Section 3084 on page 11, and Section 3093 on page 22, and the Grade A definitions that go with that.

(Said sections 3084 on page 11 and 3093 on page 22, are in words and figures as follows:

342 WILLIAM B. CONNOR, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mrs. Myers.

Q. Will you please state your name, address and employment?

A. William B. Connor, 2842 Sheridan Road; senior administrative officer, field investigation section, U. S. Department of Agriculture.

Q. I show you this document and ask you to state what it is (handing document to witness)?

A. An order of the Secretary of Agriculture that a

referendum be held among producers supplying milk to the Chicago, Illinois marketing area, and designating William B. Connor as referendum agent.

The Court: Have you a certified copy of that?

Mrs. Myers: Yes, your Honor, but not in that record, because that came after the hearing—the record—but I have a certified copy to offer.

Mr. Stein: Is this in the Federal Register?

Mrs. Myers: I don't know whether it was or not.

Q. Do you know, Mr. Connor, whether it was or not—Do you know, Mr. Connor, whether this was published in the Federal Register?

A. I don't know.

343 The Court: What I was getting at, naturally that would be certified and should be introduced by the defendant.

Mrs. Myers: No, your Honor, here is a record of the public hearing, the testimony taken and also a record of the notice, and so on. This may go in?

The Court: You are supplementing that?

Mrs. Myers: Yes, I am supplementing that. I offer in evidence as GOVERNMENT'S EXHIBIT 2, certified copy of the order of the Secretary of Agriculture directing that a referendum be conducted among the producers supplying milk to the Chicago, Illinois, marketing area, determining that the month of April, 1939 is a representative period and the designation of an agent to conduct such referendum.

Mr. Stein: That is objected to. It appears that was not properly filed of record; it is in no wise binding on the defendant.

The Court: Let it go in subject to the objection.

(Said document so received in evidence was marked "Government's Exhibit 2," and is in words and figures as follows:

344 Mrs. Myers: Q. Did you conduct a referendum in accordance with the provisions of that order?

Mr. Stein: I object, calling for a conclusion.

Mrs. Myers: I am going to continue asking him—

The Court: Just a moment.

Mr. Stein: That is what the Court will have to determine, whether it was in accordance with the order.

The Court: Your position is, as I understand it, that the publication of this document in the Federal Register makes a prima facie case?

Mrs. Myers: That is right, your Honor. I don't think any of this is necessary.

The Court: Has your prima facie case been rebutted? Has he rebutted your prima facie case?

Mrs. Myers: Not adequately; but inasmuch as he has put in the record so far evidence in accordance with his point of view, I want the record to show the referendum statement. I don't think it is necessary. I don't think our prima facie case has been disturbed at all.

The Court: What is the last order in the document?

Mr. Stein: The last order here—

The Court: Was that before the referendum?

Mr. Stein: No. No such order there; that is just a calling of the meeting for the purpose of notifying
345 the shipper of the public hearing and briefs filed, and that is the last order.

The Court: Well, it contains enough orders, doesn't it?

Mrs. Myers: It contains the tentatively approved marketing agreement upon which the order was based. You see, the way these hearings are conducted, as this record will show, a tentative agreement is presented to the public hearings to give them something to work on, and that is usually proposed by one or more proponents of the order. Then testimony is taken in connection with every paragraph of that tentatively approved agreement, and in addition any testimony anybody wants to offer on any matter that is connected with the marketing of milk in the area. Then, after the oral testimony is completed and the exhibits are admitted, briefs are filed by anyone who wants to file them and the hearing's record is considered closed. Then the order that actually is issued is the order that is based upon the evidence taken during the public hearing. The order very seldom comes out exactly as the tentative marketing agreement went in; it is changed by virtue of the testimony taken during the hearing; when the hearing is completed and the order prepared in accordance with the testimony taken at the public hearing, then the
346 referendum is conducted, and that order is submitted to the producers with the ballot, to say whether they do or do not want it; but the referendum comes after and is not included in any way. But the order itself contains the finding of the Secretary that there has been the requisite approval by the producers.

The Court: But that has not been attacked yet.

Mrs. Myers: They have been attacking it for a year.

The Court: I never heard of any attack on it.

Mrs. Myers: Yes, that appears right in these exhibits—

Mr. Stein: That the steps have not been taken that are required by law—

Mrs. Myers: (Continuing.) Government's Exhibit 1, which is offered at the beginning of every hearing that is held and which appears in one of these volumes, shows the different steps in accordance with the provisions of the marketing agricultural agreement: first a notice of the public hearing on that proposed marketing agreement regulating the handling in the area, is filed and sent out, and the designation of a presiding officer is made; the determination of the parties to be notified is contained in this; an affidavit of the posting of notice to all of the parties;

347 affidavit of the issuance of press release which goes to various newspapers giving the information concerning it throughout the country; affidavit of mailing of notices to various parties who are interested, of copies of the proposed agreement and order.

In fact every step which is necessary to give public notice that a hearing will be held, place, time and so forth, and the date for the hearing is sent out; and certified copies are contained here. This even contains a list of all the handlers of the area who were notified. And, of course, the cooperatives that were notified. And by press notices all other persons were notified.

348 The Court: Does your Federal Register as submitted prove—

Mrs. Myers: —and issued.

The Court: (Continuing.) —by a certain number of producers that has not been attacked?

Mr. Stein: We contend, if the Court please, that does not mean that the conditions precedent to an order becoming effective are all covered by recording that in the published Register.

The Court: I know that is your contention. But I don't think I agree with you. If you want to go ahead for two or three days, go ahead.

Mrs. Myers: As far as I am concerned the Government is through now. That is all, Mr. Connor, as far as I am concerned.

Mr. Stein: Are you through?

Mrs. Myers: Yes.

Cross-Examination by Mr. Stein.

Q. Pursuant to Government Exhibit No. 2, did you hold a meeting, or rather, did you hold a referendum?

349 The Court: There was no examination of this witness.

Mr. Stein: What?

The Court: He is your witness.

Mrs. Myers: Yes. I did not ask—

Mr. Stein: He has testified and she offered him as a witness here.

The Court: He didn't testify to anything that I heard except that he was an officer—If you object to the questions I will sustain the objection.

Mrs. Myers: I object, your Honor, yes.

Mr. Stein: Are you through?

Mrs. Myers: Yes, I am through.

Mr. Stein: Then I will make this gentleman my witness.

The Court: Well, this is a sort of justice of the peace court, the way you are proceedings now.

Mr. Stein: Your Honor, I want to apologize for this form of interrogation, because as I explained to your Honor, I was taken by surprise when counsel quoted this register, and in view of your Honor's ruling it is necessary for me to proceed affirmatively with this situation.

Direct Examination by Mr. Stein.

Q. You have stated your name and address?

A. I have.

350 Q. You were appointed to conduct a referendum among the producers by the Secretary of Agriculture?

Mrs. Meyers: That is already in.

A. I did.

Mrs. Myers: May I ask the Court if the defendant is making this witness his witness?

Mr. Stein: Yes.

The Court: He said yes.

Mr. Stein: Q. And did you send out any notices to producers?

A. I did.

Q. And what list did you use in determining as to whom to send the notices?

A. This list prepared by the Board of Health.

Q. Government's Exhibit 1.

A. And by Boards of Health of other cities in the area.

Q. And did you use Government's Exhibit number 1 as a basis for sending out notices to producers?

A. I used a carbon copy of that, a work copy.

Q. And what other lists did you use in that connection?

A. What other lists?

Q. What other lists, if any?

A. Lists prepared by the other Departments of Health within the marketing area.

351 The Court: Q. In other cities?

A. Yes.

Mr. Stein: Q. What other lists are there?

A. Winnetka, Evanston, Wilmette, Glencoe.

Q. Have you those lists with you?

A. I have not.

Mr. Stein: Have you those lists?

Mrs. Myers: Yes.

Mr. Stein: May I see them.

Mrs. Myers: (Hands papers.)

Mr. Stein: Q. Did you procure the lists from the Department of Health at Evanston?

A. Yes.

Q. Did you receive also a list from any other city, town or village?

A. Winnetka.

Q. Get any from Wilmette?

A. Wilmette is included in that other list. All the producers shipping into Wilmette are included in that other lists.

Q. Look at the documents I now show you, which have been handed to me by counsel for the Government, and I will ask you whether these contain the lists to whom you sent notices of the referendum?

A. Yes.

Mr. Stein: I ask that these be marked Defendant's

352 Exhibit—

Mrs. Myers: These, if I may interrupt—this (indicating) is an original certified list; this (indicating) is a copy of it. Having seen this (indicating), how about offering the copy and let us keep this original?

Mr. Stein: Sure. I will furnish a photostatic copy.

Mrs. Myers: You may have that copy. Here, the same is true in this connection (indicating papers).

Mr. Stein: All right.

Mark these as Defendants' Exhibits 6 and 7.

(Said documents were marked by the reporter as Defendant's Exhibits 6 and 7 respectively.)

353 Mr. Stein: Q. Now did you send any notices and ballots out to any one other than those that appear in Defendant's Exhibits 6 and 7?

A. No.

Q. Are those all the notices you sent out?

A. That is all.

Q. Now, at the time that you sent out the notices did you enclose the proposed tentatively approved marketing agreement?

A. I did.

Q. This Exhibit 5, is that the document you sent?

A. This is a copy of it.

Q. And did you also enclose therein a copy of a letter dated August, 1939?

A. Yes.

Q. A form of a ballot?

A. Yes.

Q. And a memorandum explaining the ballot?

A. Yes.

Q. Is this the letter which you sent out—a copy of a letter which you sent out about August, 1939, to the various producers?

A. Producers' Association.

Q. That is all contained in the document heretofore filed by the Government under the heading of "More Definite Statement of Plaintiff's Claim". Now did

354 you at that time send any copies of the tentatively approved marketing agreement to any handlers?

A. Yes, a copy to each handler on the Board of Health list.

Q. On the Board of Health list?

A. Yes.

Q. Are there any handlers on the list of Evanston?

A. Yes.

Q. And on the Winnetka list?

A. Yes.

Q. Did you send any letter to them?

A. Yes, I did.

Q. To the handlers, I am now talking about?

A. I did.

Q. What did you ask them to do?

A. Requested them to sign one copy of the marketing agreement if they were willing to enter into the agreement with the Secretary, and return to my office.

Q. Now have you any personal knowledge as to whether or not this list of producers that you say you received from the health department, was true and correct?

A. Only by the certificate connected with them.

Q. Those are all the people that you sent notices in connection with that referendum?

A. Yes.

355 Mr. Stein: That is all.

The Court: Cross-examine.

Mrs. Myers: No cross-examination.

Witness Excused.

Mr. Stein: I offer in evidence Defendant's Exhibits 6 and 7 heretofore marked.

Mrs. Myers: What?

Mr. Stein: I offer in evidence now Defendant's Exhibits 6 and 7.

Mrs. Myers: No objection.

The Court: They may be admitted.

(Said documents, marked as DEFENDANT'S EXHIBITS 6 and 7 respectively, so received in evidence, are in words and figures as follows:

356 List of Handlers

Winnetka, Illinois

	Code No.
Beatrice Creamery—428 Franklin, Waukegan, Ill.	1
Brandt Dairy—Barrington, Ill.	2
Buffalo Creek—Arlington Height, Ill. (Wheeling, Ill.)	3
Cooperative—665 McAllister, Waukegan, Ill.	4
Crabtree Farms Dairy—Lake Bluff, Ill.	5
Mellody Farms—Milwaukee Ave., Lake Forest, Ill.	6
Hawthorne Farms—Skokie Ave., Highland Park, Ill.	7
Little Orchard Dairy—Antioch, Ill.	8
Oakside Dairy—Woodstock, Ill.	9
Ravine Farms Dairy—Prairie View, Ill.	10
Rouse Bros. Dairy—Mundelein, Ill.	11
Santi Bros. Dairy—Highland Park, Ill.	12
Spinney Run Farms—Libertyville, Ill.	13

357 (Producers)

Approved City of Winnetka—Board of Health.

Name	Address	Pounds	Nos.
nAdams, Joe,	Wadsworth, Ill.	13,944	4
nAgricola, Wm.,	Lake Villa, Ill.	20,020	4
nAlbrecht, Mrs. H.,	Zion, Ill.	5,976	1
nAlcock, C.,	Wadsworth, Ill.	9,960	4
nAllanson, Park,	Mundelein, Ill.	10,956	11
nAllanson, Paul,	Mundelein, Ill.	11,952	11
Austin, Stanley,	Libertyville, Ill.	12,948	13
nBakkom, Einar,	Woodstock, Ill.	23,904	9
nBandli, N. L.,	Gurnee, Ill.	11,952	1
nBartlett, George,	Wadsworth, Ill.	9,960	1
nBauman, L.,	Lake Villa, Ill.	17,430	4
nBeckman, L.,	Barrington, Ill.	17,928	2
nBeemsterboer, J.,	Gurnee, Ill.	17,928	4
nBehm, Ed,	Grays Lake, Ill.	7,968	6
nBehm, I.,	Mundelein, Ill.	9,960	6
nBehm, Wm.,	Grays Lake, Ill.	15,936	6
nBehrens, Fred,	Lake Villa, Ill.	5,976	1
nBerdeaux, P. J.,	Libertyville, Ill.	5,976	6
nBerlin, Fred,	Lake Zurich, Ill.	8,466	6
nBerry, Wesley,	Waukegan, Ill.	7,968	1
nBeshel, Arthur,	Gurnee, Ill.	2,324	4
nBlume, Emma,	Mundelein, Ill.	17,928	2
nBrya, C.,	Antioch, Ill.	2,490	4
nBuffalo Creek Farm,	Arlington Heights, Ill.	49,800	3
nBurmiester Bros.,	Woodstock, Ill.	20,020	9
Burnidge, S.,	Prairie View, Ill.	20,020	12
Ceehin, Sam,	Libertyville, Ill.	13,944	7
nChamberlain, Dale,	Gurnee, Ill.	7,968	4
nChampney, T.,	Gurnee, Ill.	5,976	1
nChandler, Wm.,	Gurnee, Ill.	11,952	4
nCharles, Fred,	Woodstock, Ill.	10,956	9
nCharles, R.,	Woodstock, Ill.	7,470	9
nClark, A. G.,	Gurnee, Ill.	6,972	1
Clausing, Fred,	Mundelein, Ill.	7,968	7
nClement Bros.,	Libertyville, Ill.	11,952	12
nClements, A.,	Lake Zurich, Ill.	15,936	6
nClinge, Ben,	Barrington, Ill.	5,976	2
nClinge, John,	Barrington, Ill.	9,960	2

Name	Address	Pounds	Nos.
nCrabtree Farms,	Lake Bluff, Ill.	17,928	5
nCuneo, J. F.,	Libertyville, Ill.	83,664	7
nCurrey, E. G.,	Woodstock, Ill.	4,250	9
nCushman, C. L.,	Mundelein, Ill.	9,960	6
nDanner, Leo,	Woodstock, Ill.	11,952	9
nDeerpath Farm,	Libertyville, Ill.	7,968	7
nDeygert, Guy,	Greenwood, Ill.	11,952	9
nDinklenberg, Geo.,	Waukegan, Ill.	7,968	7
nDodge, George,	Wadsworth, Ill.	7,968	4
nDoolittle, C. L.,	Grays Lake, Ill.	7,968	6
Doolittle, W. L.,	Grays Lake, Ill.	15,936	13
nDooper Bros.,	Russel, Wis.	25,896	4
nDornwaldt, Carl,	Barrington, Ill.	13,944	2
nDoyle, Wm.,	Wadsworth, Ill.	9,960	4
nDrafall, Ernest,	Alonquin, Ill.	9,960	2
nDrury, E. W.,	Woodstock, Ill.	7,968	9
nDunakin, E. A.,	Lake Villa, Ill.	9,960	1
nDwyer, Leo.,	Barrington, Ill.	20,020	2
nEddy, Gil,	Woodstock, Ill.	15,936	9
358 nGlen Eddy,	Woodstock, Ill.	23,904	9
nWm. Eineke,	Dundee, Ill.	44,322	2
nElfring Bros.,	Libertyville, Ill.	8,632	11
nGeorge Elfrink,	Barrington, Ill.	20,020	2
nSam Elfrink,	Barrington, Ill.	9,960	2
nTaylor Eliason,	Zion, Ill.	9,960	1
nWalter Engelhardt,	Alonquin, Ill.	8,632	2
nR. Ernstmeyer,	Wadsworth, Ill.	6,972	1
nE. Ester,	Wadsworth, Ill.	5,976	1
nA. L. Eustace,	Barrington, Ill.	20,020	2
W. J. Exon,	Lake Villa, Ill.	11,952	13
nA. F. Farwell,	Libertyville, Ill.	39,840	13
nC. A. Faulkner,	Gurnee, Ill.	13,944	1
nFrank Ferry (No. 1),	Prairie View, Ill.	13,940	10
nFrank Ferry (No. 2),	Prairie View, Ill.	17,928	10
nFrank Ferry (No. 3),	Prairie View, Ill.	7,968	10
nWm. Fink,	Grays Lake, Ill.	11,952	6
nFlood & Myer,	Woodstock, Ill.	11,155	9
nOtto Folkers,	Waukegan, Ill.	9,960	4
nH. Freking,	Barrington, Ill.	9,960	2
nC. F. Frey,	Woodstock, Ill.	9,960	9
nWm. Gaulke,	Crystal Lake, Ill.	15,936	9
nWm. Gaulke,	Woodstock, Ill.	13,944	9

Name	Address	Pounds	Nos.
nWm. Gaulke,	Woodstock, Ill.	7,968	9
nMike Geier,	Gurnee, Ill.	7,968	1
G. Geier,	Grays Lake, Ill.	5,976	13
nGlen Gile,	Woodstock, Ill.	7,470	9
L. Gilmer,	Libertyville, Ill.	10,956	7
nE. H. Givens,	Woodstock, Ill.	5,976	9
nL. Gloden,	Prairie View, Ill.	3,453	7
nE. Gottschalk,	Mundelein, Ill.	8,964	6
nL. F. Gottschalk,	Lake Zurich, Ill.	20,020	6
nGeorge Graham,	Waukegan, Ill.	3,984	1
Tom Graham,	Gurnee, Ill.	10,956	13
Fred Grever,	Mundelein, Ill.	9,960	7
Fred Griffel,	Gurnee, Ill.	9,960	13
nArthur Hackaman,	Greenwood, Ill.	9,960	9
nAlbert Hafer,	Grays Lake, Ill.	3,320	7
W. Hafer,	Mundelein, Ill.	13,944	11
nBertha Haink,	Barrington, Ill.	11,952	2
nG. Haisma,	Antioch, Ill.	15,936	4
Mrs. C. Hamel,	Libertyville, Ill.	3,984	13
nC. Hans,	Prairie View, Ill.	6,972	6
N. Hapka,	Mundelein, Ill.	1,992	7
nMrs. S. Harrison,	Waukegan, Ill.	11,952	4
nF. O. Hartleb,	Gurnee, Ill.	9,960	1
Oscar Hauri,	Mundelein, Ill.	9,960	6
Wm. Hecketswieler,	Grays Lake, Ill.	5,976	7
G. W. Heinsohn,	Libertyville, Ill.	8,964	12
nW. Heinsohn,	Prairie View, Ill.	8,964	6
nH. Hertle,	Grays Lake, Ill.	7,968	6
nHill Top Farm,	Mundelein, Ill.	9,960	11
nR. B. Hironimus,	Mundelein, Ill.	3,984	6
nH. C. Hoag,	Grays Lake, Ill.	23,904	1
nRay Hoeft,	Lake Zurich, Ill.	9,960	6
nE. Hoffmier,	Mundelein, Ill.	5,976	10
nE. Hoffmier, Jr.,	Prairie View, Ill.	6,972	10
nM. J. Holloway,	Mundelein, Ill.	10,956	6
nR. E. Hook,	Gurnee, Ill.	7,968	1
nJohn Hopp,	Algonquin, Ill.	32,072	2
M. Horak,	Mundelein, Ill.	9,960	7
nC. M. Huck,	Palatine, Ill.	9,960	10
L. Huebsch,	Mundelein, Ill.	20,020	7
C. W. Hutchins,	Mundelein, Ill.	13,944	12
nF. C. Hutchins,	Waukegan, Ill.	7,968	1

	Name	Address	Pounds	Nos.
	n	F. T. Jira, Gary, Ill.	10,956	2
359	n	A. Johnson, Zion, Ill.	7,968	1
		S. Johnson, Deerfield, Ill.	7,968	12
		Martin Jones, Libertyville, Ill.	12,948	13
	n	Arthur Kampert, Barrington, Ill.	11,952	2
		Leroy Kane, Mundelein, Ill.	7,968	12
	n	J. Kanouski, Wadsworth, Ill.	7,968	1
	n	J. J. Kelly, Mundelein, Ill.	9,960	6
	n	Carl Knigge, Libertyville, Ill.	4,980	4
		Henry Knigge, Mundelein, Ill.	20,020	12
	n	L. Knigge, Wauconda, Ill.	16,432	6
	n	Toney Kotz, Woodstock, Ill.	7,968	9
		A. Kruckenberg, Mundelein, Ill.	7,968	7
		Wm. Kruckenberg, Mundelein, Ill.	10,956	7
	n	Henry Krummery, Grays Lake, Ill.	4,980	1
		Mrs. E. Kurtz, Libertyville, Ill.	796	13
	n	L. Kuzink, Waukegan, Ill.	3,735	4
	n	Harvey Kyle, Woodstock, Ill.	15,936	9
	n	E. K. Ladd, Prairie View, Ill.	3,984	10
	n	E. Lageschoulte, Wauconda, Ill.	7,968	2
	n	H. J. Lagodbinski, Woodstock, Ill.	9,960	9
	n	Ed Landwer, Barrington, Ill.	11,952	2
	n	Ida Landwer, Barrington, Ill.	7,968	2
	n	Joe Lange, Woodstock, Ill.	37,350	9
	n	H. F. Larsen, Palatine, Ill.	7,968	2
	n	Mike Leable, Wadsworth, Ill.	17,928	4
	n	E. K. Leverss, Woodstock, Ill.	7,968	9
	n	A. Little, Barrington, Ill.	4,980	2
	n	Little Orchard Farm, Antioch, Ill.	20,020	8
	n	E. Lossman, Gurnee, Ill.	7,968	4
	n	James A. Lowe, Algonquin, Ill.	21,912	2
	n	R. Lowe, Gary, Ill.	12,450	2
	n	Dan MacGregor, Zion, Ill.	7,968	1
	n	Andrew Madsen, Woodstock, Ill.	7,968	9
		Karl Magnessen, Grays Lake, Ill.	12,450	7
	n	C. Malanik, Woodstock, Ill.	15,936	9
	n	R. J. Mansfield, Woodstock, Ill.	4,980	9
	n	Frank Marsik, Woodstock, Ill.	3,984	9
		Cash Mason, Libertyville, Ill.	3,984	12
	n	Charles Mavis, Algonquin, Ill.	11,952	2
	n	H. E Mayer, Palatine, Ill.	6,640	7
	n	J. McNamara, Russel, Wis.	17,928	4
	n	Otto Metzler, Prairie View, Ill.	21,912	2

Name	Address	Pounds	Nos.
H. D. Meyer,	Libertyville, Ill.	17,928	4
Leo Meyer,	Mundelein, Ill.	3,984	13
nV. D. Meyer,	Gurnee, Ill.	11,952	4
Wm. Meyer,	Mundelein, Ill.	9,960	12
nJ. F. Miller,	Barrington, Ill.	7,968	2
nRalph Miller,	Antioch, Ill.	17,928	4
L. Mills,	Libertyville, Ill.	15,936	12
nJames Mingoue,	Waukegan, Ill.	8,964	4
nJ. Misavic,	Prairie View, Ill.	9,960	10
nModel Farm,	Mundelein, Ill.	7,968	11
P. Morse (No. 1),	Mundelein, Ill.	11,952	7
P. Morse (No. 2),	Mundelein, Ill.	9,960	7
nMatt Musser,	Zion, Ill.	15,936	4
nE. H. Mundhenke,	Palatine, Ill.	17,928	2
nEmil Neuman,	Libertyville, Ill.	14,940	4
nGeorge Noble,	Woodstock, Ill.	7,968	9
nFrank Nordmeyer,	Wauconda, Ill.	7,968	6
nFrank Novak,	Wadsworth, Ill.	9,960	1
nH. E. Nusbaum,	Woodstock, Ill.	13,944	9
nAlf. Nylander,	Woodstock, Ill.	11,952	9
nT. J. Peden,	Mundelein, Ill.	13,944	6
J. B. Pence,	Mundelein, Ill.	7,968	12
nTana Pepper,	Barrington, Ill.	14,940	2
nL. A. Perkins,	Woodstock, Ill.	8,964	9
W. C. H. Peters,	Mundelein, Ill.	9,960	7
nRonald Paddock,	Mundelein, Ill.	6,972	6
nC. Panzer,	Gurnee, Ill.	8,964	1
nR. Panzer,	Gurnee, Ill.	8,964	1
nJohn Paulausky,	Waukegan, Ill.	5,976	1
nMartin Phelps,	Woodstock, Ill.	7,968	9
nAlbert Pierstorff,	Antioch, Ill.	9,960	4
nWalter Poehler,	Grays Lake, Ill.	7,968	1
Lawrence Prince,	Mundelein, Ill.	10,956	12
nFrank Pye,	Zion, Ill.	11,952	1
nA. Obenauf,	Mundelein, Ill.	17,928	11
Bernard Obenauf,	Mundelein, Ill.	11,952	7
nObenhauf Bros.,	Libertyville, Ill.	15,936	6
nOmstead & Kristenson,	Woodstock, Ill.	20,020	9
Wm. O'Neil,	Grays Lake, Ill.	4,980	13
Lewis Ott,	Deerfield, Ill.	4,980	12
nF. W. Quindell,	Algonquin, Ill.	15,936	2
Dewey Radke,	Mundelein, Ill.	11,952	7

Name	Address	Pounds	Nos.
J. Radke,	Libertyville, Ill.	5,976	13
nLamont Ray,	Wadsworth, Ill.	9,960	4
nFrank Reed,	Prairie View, Ill.	17,928	2
nJ. Reynolds,	Wadsworth, Ill.	7,968	1
nLizzie Rieke,	Barrington, Ill.	10,956	2
nWm. Rockensock,	Dundee, Ill.	20,816	2
nAugusta Roper,	Palatine, Ill.	9,960	2
nJoe Round,	Barrington, Ill.	11,952	6
Walter Rudd,	Gurnee, Ill.	7,968	13
nElmer Rudsinski,	Barrington, Ill.	11,952	2
nEnos Schall,	Woodstock, Ill.	7,968	9
nA. F. Schlencogt,	Woodstock, Ill.	11,952	9
Al Schliker,	Deerfield, Ill.	5,976	12
nEd Schmarge,	Woodstock, Ill.	6,225	9
W. L. Schroeder,	Grays Lake, Ill.	5,984	13
nE. J. Schumaker,	Barrington, Ill.	9,960	2
nLouis Schuring,	Dundee, Ill.	29,880	2
C. Schwemm,	Barrington, Ill.	11,952	2
Mrs. H. Schwerman,	Mundelein, Ill.	7,968	7
H. Sealing,	Libertyville, Ill.	7,968	13
nFred Seefeldt,	Gurnee, Ill.	1,594	1
nH. Seiling,	Woodstock, Ill.	5,976	9
nJ. Seib,	Prairie View, Ill.	23,904	10
nDan Sheehan,	Lake Villa, Ill.	13,944	4
nRobert Showers,	Dundee, Ill.	3,984	2
nFrank Smith,	Woodstock, Ill.	9,960	9
nMary Smith,	Waukegan, Ill.	9,960	1
nAndrew Soby,	Algonquin, Ill.	20,020	2
Gus Stelke,	Prairie View, Ill.	4,980	12
nWm. Stiehr,	Wadsworth, Ill.	13,944	4
nWm. Stiehr, Jr.,	Zion, Ill.	9,960	1
F. W. Stiencliff,	Prairie View, Ill.	4,980	12
Frank Stone,	Mundelein, Ill.	11,952	7
nJ. W. Suchy,	Algonquin, Ill.	15,936	2
nOrlo Sunderlage,	Dundee, Ill.	15,936	2
nRay Sunderlage,	Barrington, Ill.	7,968	2
Wilber Swayer,	Gurnee, Ill.	17,928	13
nRalph Tekampe,	Mundelein, Ill.	7,968	6
nJ. L. Thain,	Lake Villa, Ill.	5,976	1
John Thatcher,	Mundelein, Ill.	11,952	12
Henry Thies,	Mundelein, Ill.	15,936	7
nC. P. Tibbetts,	Lake Forest, Ill.	11,205	6

Name	Address	Pounds	Nos.
	E. J. Umbdenstock, Mundelein, Ill.	7,968	7
361	Umbdenstock, G., Mundelein, Ill. (Added 8/25)	9,960	
n	Urban, Frank, Woodstock, Ill.	20,020	9
n	Van Landuyt, Cyril, Wadsworth, Ill.	9,960	4
n	Vogt, Charles, Palatine, Ill.	10,956	2
	Volling, Dellard, Mundelein, Ill.	13,944	12
n	Waldon, Victor, Antioch, Ill.	3,984	4
	Webb, D., Gurnee, Ill.	5,976	13
n	Weber, H. W., Prairie View, Ill.	9,960	2
n	Weber, Wm., Mundelein, Ill.	13,944	6
n	Webster, Elmer, Barrington, Ill.	9,960	2
	Wells, E., Lake Villa, Ill.	7,958	13
n	Weil, Ed, Mundelein, Ill.	3,958	11
n	Wendt, Fred, Barrington, Ill.	10,956	2
n	Wente, Elmer, Palatine, Ill.	10,956	2
n	Westergaard, A. W., Grays Lake, Ill.	5,312	6
	White, Ed, Libertyville, Ill.	9,960	13
n	Wickersheim, Wm., Lake Zurich, Ill.	13,944	6
n	Wiemuth, C., Barrington, Ill.	13,944	2
n	Wienecke, Emil, Barrington, Ill.	20,020	2
n	Wienke, Martin, Algonquin, Ill.	31,125	2
n	Winn, E. R., Barrington, Ill.	7,968	2
n	Wirtz, John, Mundelein, Ill.	11,952	11
n	Wirtz, M. C., Mundelein, Ill.	12,450	11
n	Wolthausen, Henry, Barrington, Ill.	9,960	2
n	Woodin, W. I., Mundelein, Ill.	5,976	11
n	Worth, Leslie, Waukegan, Ill.	9,960	4
n	Wurtzinger, J., Woodstock, Ill.	13,944	9
n	Yost, Paul, Barrington, Ill.	8,964	2
n	Young, J. M., Woodstock, Ill.	6,972	9
n	Ypma, E., Waukegan, Ill.	12,450	4
n	Zissing, August, Deerfield, Ill.	2,988	12
n	Shelley, M., Wadsworth, Ill.	9,960	4
	Thatcher, Ray, Mundelein, Ill.	9,960	12

362 List of Handlers, Evanston, Illinois.

Quality Dairy—1616 Payne St., Evanston, Ill.

Shorewood Farms Dairy—725 Greenbay Road, Wilmette, Ill.

Cream Crest Dairy Co.—10000 Cicero Ave., Niles Center, Ill.

Glenora Farms Dairy—1919 Greenleaf Street, Evanston, Ill.

Bornhoff's Dairy Products—Glenview, Ill.

Ratcliffe Bro. Creamery—537 Custer Ave., Evanston, Ill.

363 (Producers)

(Illegible) City of Evanston—Board of Health.

Name	Address	Pounds	(Dairy) No.
Adler, Nick, Jr.,	5458 N. Lawler Ave., Chicago, Ill.	5,907	Cream Crest
Allison, Robert,	Mt. Prospect, Ill.	3,555	Bornhoff's
Barron, Earl A.,	Grays Lake, Ill.	8,160	Cream Crest
Bartman, Geo.,	R. 1, Mt. Prospect, Ill.	3,075	Bornhoff's
Bartman, Ted.,	R. 1, Mt. Prospect, Ill.	3,661	Bornhoff's
nBaum, John,	Libertyville, Ill.	13,087	Shorwood
Beckey, W. J.,	Libertyville, Ill.	9,843	Cream Crest
nBerack, J.,	Mundelin, Ill.	3,480	Ratcliffe
nBouma, Martin,	Libertyville, Ill.	8,144	Shorwood
Buesing, Wm.,	R. 1, Mt. Proespect, Ill.	6,570	Bornhoff's
nDalziel, R. A.,	Ingleside, Grant Twp., Ill.	4,764	Quality
nDiebold, W.,	Grays Lake, Freemong Twp., Ill.	9,888	Quality
Dittrick, A.,	R. 1, Palatine, Ill.	9,814	Bornhoff's
Doolittle, C. L.,	Grays Lake, Ill.	1,972	Cream Crest
nDorfler, C.,	Mundelein, Freemont Twp., Ill.	5,840	Quality
Dowell, Frank,	Grays Lake, Ill.	9,001	Cream Crest
nDruggan, Elizabeth,	Prairie View, Ill.	15,540	Ratcliffe
nEissiler, Emil,	Barrington, Ill.	5,850	Ratcliffe
Elfering Bros.,	Waukegan, Ill., Rt. 2, Box 172	1,432	Glenora

Name	Address	Pounds	(Dairy) No.
nEllis, A.,	Barrington, Ela. Twp., Ill.	16,506	Quality
nEwald, B.,	Grays Lake, Freemont Twp., Ill.	10,320	Quality
nFeddler, Fred,	Prairie View, Ill.	7,680	Ratcliffe
nFischer, C., Sr.,	Barrington, Ela. Twp., Ill.	7,423	Quality
nFischer, S., Jr.,	Round Lake, Wauconda Twp., Ill.	11,904	Quality
nFrederick Bros.,	Grays Lake, Freemont Twp., Ill.	12,812	Quality
nFritze, Louis C.,	Prairie View, Ill.	4,849	Shorwood
nFrey, E.,	Prairie View, Vernon Twp., Ill.	2,588	Quality
nGrover, Herman,	Prairie View, Ill.	14,820	Ratcliffe
nHafer, A. R.,	Mundelein, Ill.	8,270	Glenora
Hank, E. W.,	Wheeling, Ill.	10,454	Glenora
nHanks, W.,	Prairie View, Vernon Twp., Ill.	7,416	Quality
nHapke, Henry,	Mundelein, Ill.	1,960	Glenora
Happ, Wm.,	Palatine, Ill.	6,797	Bornhoff's
364			
Harris, E.,	Grays Lake, Ill. Rt. 1	9,112	Cream Crest
nHartz, Louis,	Barrington, Ill.	18,090	Ratcliffe
Heinsohn, W. J.,	Prairie View, Ill. Rt. 2	8,870	Glenora
Heuer, Louis,	R. 1, Mt. Prospect, Ill.	6,398	Bornhoff's
Holland, Gust,	Munedlein, Ill., Rt. 2	4,152	Glenora
nHugo, A.,	Mt. Prospect, Ill.	6,876	Quality
nKaiser, F.,	Round Lake, Wauconda Twp., Ill.	7,317	Quality
nKerrigan, J. H.,	Prairie View, Ill.	424	Glenora
nKessro, G.,	Prairie View, Vernon Twp., Ill.	8,099	Quality
nKnell, H.,	Northbrook, Ill.	8,858	Bornhoff's
Knebker, Chas. W., Jr.,	Grays Lake, Ill.	5,151	Cream Crest
nLemke, John,	R. 1, Mt. Prospect, Ill.	7,326	Bornhoff's
nLemke, Wm.,	R. 1, Mt. Prospect, Ill.	5,480	Bornhoff's
nLeopold, A.,	Prairie View, Ill.	3,673	Quality
nLehman, Ernest E.,	Barrington, Ill.	10,200	Ratcliffe

Name	Address	Pounds	(Dairy) No.
Madsen, M.,	Lake Villa, Ill.	9,775	Cream Crest
nMastrie, Albert,	Prairie View, Ill.	11,700	Ratcliffe
Menthei, A.,	Northbrook, Ill.	5,384	Bornhoff's
Meyer, Peter J.,	Round Lake, Ill. Rt. 1	11,738	Cream Crest
nMiller, G.,	Ingelside, Grant Twp., Ill.	3,520	Quality
nMorse Farms,	Lake Forest, Ill.	13,143	Shorwood
Nehmer, Frank, P. M. A. Member, See Chicago Health List,	Prairie View, Ill.	3,413	Glenora
nNickels, Julius,	Prairie View, Ill.	12,658	Shorwood
Northern Trust Co. Farm, 50 S. La Salle St., Chicago, Ill. (P. J. Larsen, Mgr.)		11,295	Glenora
nPankonin, Edward,	Prairie View, Ill.	16,680	Ratcliffe
nPegelow, P.,	Prairie View, Vernon Twp., Ill.	3,332	Quality
nPerry, Joseph W.,	Mundelein, Ill.	5,490	Ratcliffe
Peterson, Frederick J. A.,	Lake Villa Ill.	7,412	Cream Crest
nPiepenbrink, Fred,	Mt. Prospect, Ill. Rand Road	8,870	Glenora
Pohlman, E.,	R. 1, Arlington Heights, Ill.	13,649	Bornhoff's
Rappelt, Mrs. Elizabeth,	Munedlein, Ill. Rt. 2	11,900	Cream Crest
Raupp, Frank,	R. 1, Arlington Heights, Ill.	15,400	Bornhoff's
Richetti, John,	Barrington, Ill.	3,840	Ratcliffe
nRyerson, E. L., Jr.,	Prairie View, Ill.	4,990	Bornhoff's
365			
Schoenbeck, Ed.,	R. 1, Arlington Heights, Ill.	5,244	Bornhoff's
Schoenbeck, F.,	R. 1, Mt. Prospect, Ill.	6,287	Bornhoff's
Schoenbeck, Wm.,	R. 1, Arlington Heights, Ill.	4,869	Bornhoff's
nSessons, W.,	Mt. Prospect, Ill.	9,617	Quality

Name	Address	Pounds	(Dairy) No.
nSilvans, Ray,	Libertyville, Ill.	12,823	Shorwood
Slama, Frank,	Lake Villa, Ill.	9,298	Cream Crest
nStats, A.,	Libertyville, Ill.	5,515	Shorwood
nSpohrlein, Arthur,	Prairie View, Ill.	9,630	Ratcliffe
nSylvanus, Edward,	Gurney, Ill.	11,198	Shorwood
nTam-A-Rack Farm (C. Garland)	Ingleside, Grant Twp., Ill.	9,179	Quality
nTerlunen, B.,	Barrington, Ill.	15,180	Ratcliffe
Utpadel, Wm.,	Wheeling, Ill.	4,362	Bornhoff's
nVasey, A.,	Grays Lake, Wauconda Twp., Ill.	11,102	Quality
nVogt, R.,	Ingleside, Ill.	10,204	Quality
Wallace, A. W.,	1101 N. Menard Ave., Chicago, Ill.	New	Cream Crest
Wasser, Dan, R. 1.,	Mt. Prospect, Ill.	10,633	Bornhoff's
Weidner, A.,	R. 1, Arlington Heights, Ill.	12,675	Bornhoff's
Weidner, F.,	R. 1, Arlington Heights, Ill.	15,117	Bornhoff's
Weidner, G. Anton,	R. 1, Box 79, Palatine, Ill.	11,076	Bornhoff's
Werhane, Art,	R. 1, Glenview, Ill.	4,791	Bornhoff's
nWildhagen, A.,	Prairie View, Vernon Twp., Ill.	8,552	Quality
nWilley, T.,	Ingleside, Grant Twp., Ill.	794	Quality
Wischman, Wm.,	R. 1, Mt. Prospect, Ill.	4,472	Bornhoff's
nWiezien, A.,	Libertyville, Ill.	7,296	Quality

366 Mr. Stein: The defendant rests.

Thereupon the defendant rested its case.

The Court: Any other rebuttal?

Mrs. Myers: No, Your Honor.

Mr. Stein: Defendant moves, if the Court please, for a judgment. In that connection I would like to be heard. We contend that the order in this case, the evidence shown here, does not comply with the requirements of the statute. Will your Honor hear me?

The Court: Well, we have argued this case out several times.

Mr. Stein: Well, these are new points, your Honor, that

appear now with regard to the evidence. May I call your Honor's attention to the—

The Court: I think I said the last time we had the matter up that I was going to dispose of this matter, and I am.

Mr. Stein: I am prepared to go ahead.

The Court: Now, just a moment. In addition to the findings that I made on the motion for summary judgment, you may find that the matter reserved in the memorandum, namely, the allegation in paragraph 4 of the complaint,
367 reading: "The order was issued by the Secretary in full compliance with law and all conditions precedent to the effectiveness of said order have occurred". You may find in addition to the finding which the Court made in the motion for the summary judgment, you may find that that allegation of the complaint is proved.

Mr. Stein: Well, may I be heard on it?

The Court: And then, having all those facts so found, the Court will find that the business of the defendant was not in the current of interstate commerce and did not burden, obstruct or in any way affect interstate or foreign commerce.

The bill of complaint will be dismissed for want of equity. The motion to strike out the counterclaim will be denied. An injunction will be issued, as prayed in the counter claim.

Tender your findings of fact and the proper conclusions of law and come in with it. And I presume that each of you will take cross appeals from the rulings of the Court, so you will have the whole case before the upper court.

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156 And afterwards, to wit, on the 29th day of October, A. D. 1940, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Entered Oct. 29, 1940.

157 IN THE DISTRICT COURT OF THE UNITED STATES.

Wednesday, October 29, A. D. 1940.

Present: Hon. Charles E. Woodward, District Judge.

• • (Caption—1211) • •

This cause coming on to be heard on the plaintiff's motion to strike the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defenses and on the plaintiff's motion to dismiss counterclaim after arguments of counsel It Is Ordered that the motion to strike be and the same is hereby denied as to the third defense and sustained as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defenses and the Court reserves its ruling on the motion to dismiss counterclaim and thereupon this cause coming on to be heard on proof on converted issues of fact and the Court having heard the evidence adduced It Is Ordered that the plaintiff's motion to dismiss counterclaim be and the same is hereby denied. Whereupon the defendant by its attorneys enters its motion for judgment which motion is allowed and this cause is continued to October 31, A. D. 1940 for the entry of findings of fact and decree.

158 And afterwards, to wit, on the 31st day of October, A. D. 1940, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Findings of Fact and Conclusions of Law:

159 (Caption)

This cause having come on for trial and the Court having heard all of the evidence adduced on behalf of the plaintiff and all of the evidence adduced on behalf of the defendant, and having heard arguments of counsel for both parties, now makes the following

FINDINGS OF FACT.

Filed Oct. 31, 1940.

(1) This proceeding is brought by the United States of America upon request of the Secretary of Agriculture of the United States under Section 8a(6) of the Act of May 12, 1933 (48 Stat. 31; 7 U. S. C. A., Section 608a(6)) as amended May 9, 1934 (48 Stat. 672), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (50 Stat. 246) to enforce the provisions of Order No. 41, order regulating the handling of milk in the Chicago, Illinois, marketing area.

(2) The defendant, Wrightwood Dairy Company, is a corporation organized on April 5, 1932 under the laws of the State of Illinois with its principal business in Chicago, Illinois, for the purpose of handling milk and milk products. In connection with the operation of its business, it acquired the premises known as 2942-48 North Ashland Avenue, Chicago, Illinois, together with machinery, equipment, milk routes and other valuable personal property of a value in excess of $100,000.00.

(3) On August 28, 1939 the Secretary of Agriculture of the United States issued Order No. 41, order regu-
160 lating the handling of milk in the Chicago, Illinois, marketing area, a copy of which is attachetd to the bill of complaint and marked Exhibit "A", and, by reference, is made a part of these findings of fact.

(4) Order No. 41 was published in the Federal Register on August 30, 1939 to become effective on September 1, 1939.

(5) The Order was issued by the Secretary in full compliance with the law. All conditions precedent to the effectiveness of said Order have occurred.

(6) The defendant purchases, and for some time prior to the filing of the complaint had purchased approximately 30,000 pounds of milk per day from approximately 70 producers located entirely within the State of Illinois, and has purchased no milk from any producer located outside the State of Illinois. The milk so purchased is processed by the defendant in its plant in Chicago and is sold and distributed within the State of Illinois in competition with the milk of other handlers in the area, and no portion is intended to be sold or is sold for use outside the State of Illinois. No portion of the milk handled by the defendant

prior to its ultimate distribution by the defendant is physically and inextricably in any wise intermingled in the processing plant of the defendant with milk which has crossed state lines.

7. The defendant has made no reports to the Market Administrator since the effective date of the order.

8. The defendant has made no payments to the Market Administrator for deposit in the Producer-Settlement
161 Fund, established pursuant to Section 941.8, Paragraph (b) of said Order, No. 41.

(9) The defendant has made no payment to the Market Administrator of its pro-rata share of the administration of the order as required by Section 941.9 of said Order No. 41.

(10) Milk sold and distributed in the Chicago, Illinois, marketing area is produced in four states—Illinois, Indiana, Wisconsin and Michigan. Over 60 percent of all the milk handled in the Chicago, Illinois, marketing area is produced in the State of Illinois and less than 40 percent is brought in from the other above-named states. Prior to the issuance of Order No. 41, 60 percent of the milk sold and distributed in the Chicago, Illinois, marketing area was produced in Illinois, 23 percent was produced in Wisconsin, 16 percent was produced in Indiana and 1 percent was produced in Michigan.

(11) That the defendant, in the handling of milk, was engaged in intrastate business and was not in the current of interstate or foreign commerce, and did not directly burden, obstruct or affect interstate or foreign commerce in milk marketed within the Chicago, Illinois, marketing area.

Upon the above and foregoing Findings of Fact, the Court states the following

CONCLUSIONS OF LAW.

(1) Said Order No. 41 is a valid regulation issued by the Secretary of Agriculture in accordance with the provisions of the Agricultural Marketing Agreement Act of 1937.

162 (2) Said Order No. 41, issued by the Secretary of Agriculture of the United States, does not apply to the defendant.

(3) The defendant is not a handler of milk as defined in

Section 8c(1) of the Agricultural Marketing Agreement Act of 1937, and in Section 941.1(a)(4) of the Order, and is, as such, not subject to the applicable provisions of the Act and of the Order.

(4) The complaint, as amended, should be dismissed on the merits for want of equity.

(5) A permanent injunction should issue, as prayed in defendant's counterclaim, preventing and restraining the plaintiff, its officers, agents, attorneys and employees, and all persons acting in concert with it, from in any way enforcing the said Order No. 41 or any of its provisions against the defendant, Wrightwood Dairy Company, its officers, directors, agents and employees, or to compel the defendant, its officers, directors, agents and servants to comply with said Order No. 41 or any of its provisions.

Charles E. Woodward,
Judge.

Dated October 31, 1940.

163 And afterwards, to wit, on the 31st day of October, A. D. 1940, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Final Decree: Entered Oct. 31, 1940.

164 (Caption)

FINAL JUDGMENT.

This cause coming on to be heard and the Court having heard evidence and having listened to the arguments of counsel and having made and filed findings of fact and conclusions of law, and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the complaint, as amended, be and the same is hereby dismissed on the merits for want of equity;

It Is Further Ordered, Adjudged and Decreed that the United States of America, its officers, agents, attorneys and employees, and all persons acting in concert with it, and each and any of them, be and they hereby are perpetually enjoined, restrained and forbidden from in any wise enforcing said Order No. 41, Order regulating the handling

of milk in the Chicago, Illinois, marketing area, issued by the Secretary of Agriculture of the United States on August 28, 1939, effective September 1, 1939, or any of its provisions as against the defendant, Wrightwood Dairy Company, a corporation, its officers, directors, agents and employees, or to compel the said Wrightwood Dairy Company, its officers, directors, agents and employees to comply with the said Order No. 41 or any of its provisions, as prayed for in defendant's counterclaim.

Enter:

Charles E. Woodward,
Judge.

Dated October 31, 1940.

Filed Nov. 28, 1940.

200 And on, to wit, the 28th day of November, 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion for New Trial, in words and figures following, to wit:

201 (Caption)

MOTION FOR NEW TRIAL.

Comes now the United States of America, by J. Albert Woll, United States Attorney for the Northern District of Illinois, Eastern Division, and in accordance with the provisions of Rule 59 (a) (2) of the Rules of Civil Procedure for the District Courts of the United States, moves the Court for a new trial in the above-entitled case for the following reasons:

(1) Since judgment was entered herein, new and material evidence, which did not exist prior to the entry of said judgment, has developed and has come to the knowledge of plaintiff by means of notices from handlers of milk in the Chicago Milk Marketing Area of their intention no longer to comply with the provisions of Order No. 41, as amended, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, because of inability to compete with defendant herein under conditions created by said judgment; and said evidence shows that said defendant's handling of milk is directly affecting, burdening and obstructing interstate commerce in milk in said area;

(2) There is manifest error of law on the face of the record herein.

Wherefore, plaintiff prays that rehearing be granted upon a date certain in order that the foregoing evidence may be introduced and the question of law be argued.

J. Albert Woll,
J. Albert Woll,
United States Attorney,
Chicago, Illinois.

John A. Looby, Jr.,
John A. Looby, Jr.,
Assistant United States Attorney,
Chicago, Illinois.

Mary Connor Myers,
Mary Connor Myers,
Principal Attorney, Solicitor's Office, Department of Agriculture, Washington, D. C.

202 And afterwards, to wit, on the 9th day of December, 1940, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Dec. 9, 1940.

203 In the District Court of the United States.

(Caption—1211)

Monday, December 9, A. D. 1940.

Present: Hon. Charles E. Woodward, District Judge.

This cause coming on to be heard upon the plaintiff's motion for a new trial in said cause It Is Ordered by the Court that said motion be and the same is hereby overruled.

Filed Dec. 13, 1940. 165 And on, to wit, the 13th day of December, A. D. 1940, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal, in words and figures following, to wit:

166 (Caption)

NOTICE OF APPEAL.

Comes now the United States, by J. Albert Woll, United States Attorney in and for the Northern District of Illinois, Eastern Division, and hereby gives notice of appeal by the plaintiff in the above-entitled cause to the Circuit Court of Appeals for the Seventh Circuit from the final judgment entered herein on October 31, 1940.

J. Albert Woll,
United States Attorney.

Mary Connor Myers,
Principal Attorney, Department of Agriculture.

Filed Feb. 21, 1941. 173 And on, to wit, the 21st day of February, A. D. 1941, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Contents of Record and Statement of Points on Appeal, in words and figures following, to wit:

174 (Caption)

PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL.

Comes now the United States of America, plaintiff-appellant in the above-entitled cause, and says that it relies upon the following points in the prosecution of its appeal from the final judgment entered by the District Court in the above-entitled cause October 31, 1940:

1. The District Court erred in entering the final judgment herein.

2. The District Court erred in dismissing the plaintiff's complaint for want of equity.

3. The District Court erred in denying plaintiff's motion to dismiss defendant's counterclaim.

4. The District Court erred in finding, No. 11 of its findings of fact.

That the defendant, in the handling of milk, was engaged in intrastate business and was not in the current of interstate or foreign commerce, and did not directly burden, obstruct or affect interstate or foreign commerce in milk marketed within the Chicago, Illinois, marketing area.

5. The District Court erred in concluding as a matter of law, conclusion No. 3 of its conclusions of law, that

The defendant is not a handler of milk as defined in Section 8(c)(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a)(4) of the Order, and is, as such, not subject to the applicable provisions of the Act and of the Order.

6. The District Court erred in ignoring and, in effect, rejecting the Secretary's finding contained in Section 941.0(1) of Order No. 41, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture of the United States on August 28, 1939, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937.

That all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as to directly burden, obstruct or affect interstate commerce in milk or its products;

without considering or determining upon examination of defendant's exhibits 1, 2, 3 and 4 (constituting the record of the Secretary's hearing) whether such finding of the Secretary was supported by substantial evidence introduced at the public hearing conducted by the Secretary prior to, and with respect to, the issuance of Order No. 41.

175 7. The District Court erred in making a finding, finding No. 11 of its findings of fact, contrary to the finding of the Secretary of Agriculture contained in Section 941.0(1) of Order No. 41, quoted in point No. 6 above, in the absence of any showing by the defendant that the Secretary's said finding was arbitrary, capricious and not supported by evidence introduced during the public hearing conducted prior to, and with respect to, the issuance of Order No. 41.

8. The District Court erred in failing and refusing to

find (a) that the Secretary's finding contained in Section 941.0(1) of Order No. 41, quoted in point 6 above, was supported by substantial evidence introduced at the public hearing conducted by the Secretary prior to, and with respect to, the issuance of Order No. 41; (b) that the milk handled by the defendant and the defendant's handling thereof come within the aforesaid finding of the Secretary; and (c) that, therefore, the defendant is a handler subject to the provisions of the Act and or Order No. 41.

9. The District Court erred in denying plaintiff's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

10. The District Court erred in refusing, upon final hearing, to issue a mandatory injunction as prayed in the complaint commanding the defendant to comply fully with all of the provisions of Order No. 41 from the effective date thereof, September 1, 1939, to July 1, 1940.

11. The District Court erred in refusing, upon final hearing, to issue an injunction as prayed in the complaint commanding the defendant to file reports with the Market Administrator established under Section 941.2 of Order No. 41 covering the delivery periods between September 1, 1939, and July 1, 1940, in accordance with the provisions of Section 941.3(a) of said Order No. 41.

12. The District Court erred in refusing, upon final hearing, to issue an injunction as prayed in the complaint commanding the defendant to make payments for the delivery periods between September 1, 1939, and July 1, 176 1940, in accordance with the provisions of Section 941.8(c) of said Order No. 41, to producers of milk supplying the Chicago Marketing Area.

13. The District Court erred in refusing, upon final hearing, to issue an injunction as prayed in the complaint commanding the defendant to make payments in accordance with the provisions of Section 941.9(a) of said Order No. 41, to the said Market Administrator representing defendant's pro rata share of the expense of administering said Order No. 41 during the delivery periods from September 1, 1939, to July 1, 1940.

14. The District Court erred in issuing the permanent injunction prayed for in defendant's counterclaim enjoining and restraining the plaintiff from in any wise enforcing said Order No. 41 against defendant or compelling defendant to comply with said order.

15. The said final judgment is not supported by the District Court's findings of fact.

16. The District Court's conclusion of law No. 2 Said Order No. 41 issued by the Secretary of Agriculture of the United States does not apply to the defendant is contrary to the District Court's findings of fact..

Wherefore, the plaintiff-appellant, the United States of America, prays that the said final judgment in this cause may be reversed, and for such other and further relief as may be just in the premises.

J. Albert Woll,
United States Attorney,

John A. Looby, Jr.,
Assistant United States Attorney,

John S. L. Yost,
Special Assistant to the Attorney General, Department of Justice,

Mary Connor Myers,
Principal Attorney, Department of Agriculture,
Attorneys for Plaintiff-Appellant.

177 (Caption)

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

Appellant designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Complaint with Exhibit A thereto.
2. Motion for preliminary injunction.
3. Affidavit of Nikitas J. Cladakis in support of action for preliminary injunction.
4. Affidavit of Otie M. Reed in support of motion for preliminary injunction.
5. Motion to dismiss complaint and for more definite statement of the nature of plaintiff's claim.
6. Order allowing in part and disallowing in part defendant's motion for more definite statement.
7. Affidavit of Joseph Sawa in opposition to motion for preliminary injunction.

8. More definite statement in accordance with order of court.
9. Answer and counterclaim.
10. Motion to dismiss counterclaim.
11. Motion of plaintiff for summary judgment.
12. Affidavit of Herbert H. Erdmann in support of motion for summary judgment.
13. Affidavit of William B. Connor in support of motion for summary judgment.
14. Amendment to answer.
15. Supplemental answer.
16. Affidavit of Ernest Allen in opposition to motion for summary judgment.
17. Affidavit of Joseph Sawa in opposition to motion for summary judgment.
18. Plaintiff's supplemental motion for summary judgment.
19. Plaintiff's motion to strike third to eleventh defenses, inclusive.
20. Findings of fact and order of court denying plaintiff's motion for summary judgment.
21. Defendant's exhibits 1, 2, 3 and 4 (record of hearing conducted by the Secretary of Agriculture prior to, and
178 with respect to, issuance of Order No. 41) introduced by defendant at final hearing of cause October 29, 1940. Not capable of being set forth in the transcript of record on appeal, said exhibits are to be certified and transmitted by the clerk of the District Court to the clerk of the Circuit Court of Appeals as original documents per order of the District Court dated February 18, 1941.
22. Stipulation with respect to original documents mentioned in No. 21 above and order of court thereon dated February 18, 1941.
23. Order of court embodying ruling announced by the court October 29, 1940, denying plaintiff's motion to strike defendant's third defense, granting plaintiff's motion to strike defendant's fourth to eleventh defenses, inclusive, and denying plaintiff's motion to dismiss the counterclaim.
24. Findings of fact and conclusions of law made and filed by the District Court October 31, 1940, in support of its final judgment.
25. Final judgment.
26. Plaintiff's notice of appeal.
27. Order of court dated January 18, 1941, extending

time for filing transcript of record on appeal to February 1, 1941.

28. Order of court dated January 29, 1941, extending time for filing transcript of record on appeal to March 10, 1941.

29. Defendant's notice of appeal and cross-appeal.

30. Statement of the points on which plaintiff-appellant intends to rely on this appeal.

31. This designation of contents of the record on appeal and proof of service thereof.

J. Albert Woll,
United States Attorney,
John A. Looby, Jr.,
Assistant United States Attorney,
John S. L. Yost,
Special Assistant to the Attorney General, Department of Justice,
Mary Connor Myers,
Principal Attorney Department of Agriculture,
Attorneys for Plaintiff-Appellant.

Service of the foregoing designation of the contents of the record and accompanying statement of points relied on by the plaintiff-appellant on this appeal is hereby acknowledged this 21st day of February, 1941.

Pines, Stein & Beber,
Abraham Lepine,
Attorneys for Defendant.

Filed Jan. 24, 1941.

171 And on, to wit, the 24th day of January, A. D. 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal and Cross-Appeal in words and figures following, to wit:

172 (Caption)

NOTICE OF APPEAL AND CROSS-APPEAL.

Notice is hereby given that Wrightwood Dairy Company, defendant above named, hereby appeals and cross-appeals to the Circuit Court of Appeals for the Seventh Circuit from that part of the order entered in the above entitled cause on October 29, 1940 which sustained plaintiff's motion to strike defendant's Fourth to the Eleventh defenses, and each of them, filed to plaintiff's complaint.

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street, Chicago, Illinois.
Pines, Stein & Beber,
Pines, Stein and Beber,
10 South LaSalle Street, Chicago, Illinois.
Abraham Lepine,
Abraham Lepine,
Attorneys for Appellant and Cross-Appellant, Wrightwood Dairy Company.

Received a copy of Notice of Appeal and Cross-Appeal this 24th day of January, A. D. 1941.

J. Albert Woll,
Attorney for Plaintiffs,
A. J. Hill.

204 And on, to wit, the 31st day of January, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Amendment to Notice of Appeal and Cross-Appeal, in words and figures following, to wit: Filed Jan. 31, 1941.

205 (Caption)

AMENDMENT TO NOTICE OF APPEAL AND CROSS-APPEAL OF WRIGHTWOOD DAIRY COMPANY, DEFENDANT, FILED JANUARY 24, 1941.

Notice Is Hereby Given that Wrightwood Dairy Company, defendant above named, hereby appeals and cross-appeals to the Circuit Court of Appeals for the Seventh Circuit without in any wise waiving its notice of appeal and cross-appeal heretofore filed on January 24, 1941, but in addition thereto, from that part of the Findings of Fact entered by said court on October 31, 1940, reading as follows:

"5. The Order was issued by the Secretary in full compliance with the law. All conditions precedent to the effectiveness of said Order have occurred."

and from that part of the Conclusions of Law entered by said court on October 31, 1940, reading as follows:

"1. Said Order No. 41 is a valid regulation issued by the Secretary of Agriculture in accordance with the provisions of the Agricultural Marketing Agreement Act of 1937."

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street, Chicago, Illinois.
Pines, Stein & Beber,
Pines, Stein & Beber,
10 South LaSalle Street, Chicago, Illinois.
Abraham Lepine,
Abraham Lepine,
Attorneys for Appellant and Cross-Appellant, Wrightwood Dairy Company.

Filed Feb. 26, 1941.

368 And on, to wit, the 26th day of February, 1941, came the Defendant-Appellee-Cross Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record and Statement of Points, in words and figures following, to wit:

369 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—1211)

DESIGNATION OF ADDITIONAL PORTION OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

Wrightwood Dairy Company, defendant-appellee, appellant, and cross-appellant, hereby designates, pursuant to Rule 75(a) of Civil Procedure, the following additional portions of the record, proceedings and evidence to be included in the record on appeal in the above-entitled action:

1. Motion of defendant and order entered June 25, 1940, for leave to file amendment to defendant's answer.

2. Motion of defendant and order entered September 9, 1940, granting defendant leave to file a supplemental answer.

3. Order of September 19, 1940 entering defendant's motion to strike affidavits of W. B. Connor, Nikitas J. Cladakis, Otie M. Reed, and Herbert H. Erdmann.

4. Motion of defendant to strike affidavits of W. B. Connor, Herbert H. Erdmann, Nikitas J. Cladakis, and Otie M. Reed.

5. Motion for new trial filed by plaintiff.

6. Order entered December 9, 1940 overruling plaintiff's motion for new trial.

7. Amendment to notice of appeal and cross-appeal filed by defendant.

8. Motion of defendant to require plaintiff to furnish reporter's transcript of evidence, and proof of service thereof, filed February 25, 1941.

9. Order entered February 26, 1941 granting motion of defendant to require plaintiff to furnish reporter's transcript of evidence.

370 10. Reporter's stenographic transcript of all of the evidence and proceedings at the trial or final hearing

of cause, October 29, 1940, and including all exhibits excepting defendant's exhibits 1, 2, 3, and 4 heretofore included in plaintiff's Designation.

11. Statement of points on which defendant-appellant and cross-appellant intends to rely on this appeal.

12. This designation of additional portion of the record, proceedings and evidence to be included in the record on appeal, and proof of service thereof.

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street, Chicago, Illinois.
Pines, Stein & Beber,
Pines, Stein and Beber,
10 South LaSalle Street, Chicago, Illinois.
Abraham Lepine,
Abraham Lepine,
Attorneys for Defendant-Appellee, Appellant, and Cross-Appellant.

Service of the foregoing designation of additional portion of the record, proceedings and evidence and accompanying statement of points relied on by the defendant-appellant and cross-appellant on this appeal is hereby acknowledged this 26th day of February, 1941.

J. Albert Wolls,
Attorney for Plaintiff-Appellant.

371 In the District Court of the United States.

* * (Caption—1211)— * *

DEFENDANT-APPELLANT'S AND CROSS-APPELLANT'S STATEMENT OF POINTS ON APPEAL.

Comes now the Wrightwood Dairy Company, defendant-appellant and cross-appellant in the above entitled cause, and says that it relies upon the following points in the prosecution of its appeal and cross-appeal from that part of the order entered in the above entitled cause on October 29, 1940 which sustained plaintiff's motion to strike defendant's Fourth to Eleventh Defenses, both inclusive, and each of them, filed to plaintiff's complaint, and to that part of the Findings of Fact entered by said court on October 31, 1940, reading as follows:

"5. The Order was issued by the Secretary in full

compliance with the law. All conditions precedent to the effectiveness of said Order have occurred."

and from that part of the Conclusions of Law entered by said court on October 31, 1940, reading as follows:

"1. Said Order No. 41 is a valid regulation issued by the Secretary of Agriculture in accordance with the provisions of the Agricultural Marketing Agreement Act of 1937."

1. The District Court erred in sustaining plaintiff's motion to strike defendant's Fourth Defense filed to plaintiff's complaint.

2. The District Court erred in sustaining plaintiffff's motion to strike defendant's Fifth Defense filed to plaintiff's complaint.

372 3. The District Court erred in sustaining plaintiff's motion to strike defendant's Sixth Defense filed to plaintiff's complaint.

4. The District Court erred in sustaining plaintiff's motion to strike defendant's Seventh Defense filed to plaintiff's complaint.

5. The District Court erred in sustaining plaintiff's motion to strike defendant's Eighth Defense filed to plaintiff's complaint.

6. The District Court erred in sustaining plaintiff's motion to strike defendant's Ninth Defense filed to plaintiff's complaint.

7. The District Court erred in sustaining plaintiff's motion to strike defendant's Tenth Defense filed to plaintiff's complaint.

8. The District Court erred in sustaining plaintiff's motion to strike defendant's Eleventh Defense filed to plaintiff's complaint.

9. The District Court erred in failing to overrule plaintiff's motion to strike defendant's Fourth to the Eleventh Defenses, and each of them, filed to plaintiff's complaint.

10. The District Court erred in Finding No. 5 of its Findings of Fact, reading as follows:

"5. The Order was issued by the Secretary in full compliance with the law. All conditions precedent to the effectiveness of said Order have occurred."

11. Said Finding of Fact No. 5 is contrary to the evidence.

12. The District Court's Conclusion of Law No. 1, reading as follows, is contrary to the law:

373 "1. Said Order No. 41 is a valid regulation issued by the Secretary of Agriculture in accordance with

the provisions of the Agricultural Marketing Agreement Act of 1937."

13. Said Finding of Fact No. 5 and said Conclusion of Law No. 1 entered by the District Court are contrary to the law and the evidence.

14. The District Court erred in failing to find that Order No. 41, Order regulating the handling of milk in the Chicago, Illinois marketing area, issued by the Secretary of Agriculture of the United States on August 28, 1939, was not in compliance with the law and that all conditions precedent to the effectiveness of said Order have not occurred.

15. Said District Court erred in failing to find as a part of the Conclusions of Law that said Order No. 41 was not a valid regulation and was not issued by the Secretary of Agriculture in accordance with the provisions of the Agricultural Marketing Agreement Act of 1937.

16. The District Court erred in failing to find that said Order No. 41 was invalid, unenforceable, and contrary and not in compliance with the provisions of the Agricultural Marketing Agreement Act of 1937.

Wherefore, Wrightwood Dairy Company, defendant-appellant and cross-appellant, prays that that part of the order entered in the above entitled cause on October 29, 1940 which sustained plaintiff's motion to strike defendant's Fourth to Eleventh Defenses, and each of them, filed to plaintiff's complaint, may be reversed, and that part of the Findings of Fact entered by said District Court on October 31, 1940, being No. 5 thereof, and that part of the Conclusions of Law entered by said District Court
374 on October 31, 1940, being No. 1 thereof, be held to be erroneous and reversed; and for such other and further relief as may be just in the premises.

Alvin E. Stein,
Alvin E. Stein,
10 South La Salle Street,
Chicago, Illinois,
Pines, Stein and Beber,
Pines, Stein and Beber,
10 South La Salle Street,
Chicago, Illinois,
Abraham Lepine,
Abraham Lepine,
Attorneys for Defendant-Appellant and Cross-Appellant.

Filed Feb. 18, 1941.

154 And on, to wit, the 18th day of February, A. D. 1941, came the Plaintiff and Defendant herein by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

155 (Caption)

STIPULATION AS TO ORIGINAL PAPERS IN RECORD ON APPEAL.

It is hereby stipulated by the attorneys for the respective parties to the above-entitled cause that Defendant's Exhibits Numbered 1, 2, 3 and 4, being the stenographic report of hearing In The Matter Of Proposed Marketing Agreement and Proposed Order Regulating the Handling of Milk In the Chicago, Illinois, Marketing Area, held on June 26, 27, 28, 29 and 30, 1939, before the duly authorized representative of the Secretary of Agriculture, may be sent to the appellate court in lieu of copies thereof by the clerk of the District Court, and there retained as part of the record on appeal to be referred to by the appellate court and by counsel for the appellants and for the appellees in their briefs and upon oral argument of the cause in the appellate court, all in accordance with the provisions of Rule 75(i) of the Rules of Civil Procedure for the District Courts of the United States.

J. Albert Woll,
J. Albert Woll,
United States Attorney,
Chicago, Illinois,
Mary Connor Meyers,
Mary Connor Meyers,
Principal Attorney, Department of Agriculture, Washington, D. C.,
Attorneys for Plaintiff.

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street,
Chicago, Illinois,
Pines, Stein & Beber,
Pines, Stein & Beber,
10 South LaSalle Street,
Chicago, Illinois,
Abraham Lepine,
Attorneys for Defendant.

375 And afterwards, to wit, on the 18th day of February, 1941, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Feb. 18, 1941.

376 (Caption)

ORDER.

In accordance with the provisions of Rule 75(i) of the Rules of Civil Procedure for the District Courts of the United States and the stipulation between attorneys for the respective parties in the above entitled cause.

It Is Ordered that Defendant's Exhibits Numbered 1, 2, 3 and 4, being the stenographic report of the public hearing In the Matter of Proposed Marketing Agreement and Proposed Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, held before a duly authorized representative of the Secretary of Agriculture on June 26, 27, 28, 29 and 30, 1939, be sent by the clerk of the District Court to the appellate court in their original form in lieu of copies thereof, there to be retained as part of the record on appeal and to be referred to by the appellate court and by counsel for the appellants and for the appellees in their briefs and upon oral argument of the cause in the appellate court.

Charles E. Woodward,
United States District Judge.

Dated February 18, 1941.

Filed Feb. 25, 1941.

206 And on, to wit, the 25th day of February, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Require Plaintiff to Furnish Reporter's Transcript of Evidence, in words and figures following, to wit:

207 (Caption)

MOTION OF DEFENDANT TO REQUIRE PLAINTIFF TO FURNISH REPORTER'S TRANSCRIPT OF EVIDENCE.

Now comes the Wrightwood Dairy Company, defendant in the above entitled cause, by its attorneys, and shows to the court that the plaintiff in the above entitled cause did file its Notice of Appeal and that defendant did also file its Notice of Appeal and Cross Appeal and amendment thereto to the United States Circuit Court of Appeals, pursuant to law.

That on February 21, 1941 the plaintiff served upon counsel for the defendant its Designation of Portions of Record to be contained in the record on appeal; that plaintiff designated for inclusion in its Designation defendant's exhibits 1, 2, 3 and 4, being part of the evidence or proceedings at the trial or hearing which was stenographically reported; that contrary to Rule 75(b), the plaintiff failed to file two copies of such additional parts of such evidence or proceedings at the trial or hearing as defendant may need to enable it to designate and file the parts it desires to have added.

Defendant further shows to the court that said reporter's transcript of the evidence or proceedings at the trial or hearing of the above entitled cause are necessary and that defendant desires to designate and file the remaining evidence and proceedings at the trial other than that designated by the plaintiff and to add the same to the record on appeal herein.

Wherefore, defendant moves the court, pursuant to the provisions of Rule 75(b) of the Supreme Court of the United States, for an order requiring the plaintiff to file two copies of the reporter's transcript of the evidence or proceedings in the above entitled cause, together with all

of the defendant's exhibits offered and received in evidence, other than defendant's exhibits 1, 2, 3 and 4 heretofore included in plaintiff's Designation, and for such other orders as to the court may seem meet.

Alvin E. Stein,
Alvin E. Stein,
10 South LaSalle Street,
Chicago, Illinois,
Pines, Stein & Beber,
Pines, Stein & Beber,
10 South LaSalle Street,
Chicago, Illinois,
Abraham Lepine,
Abraham Lepine,
Attorneys for Defendant.

208 State of Illinois, } ss.
County of Cook. }

Alvin E. Stein, being first duly sworn, upon oath deposes and says that he is one of the attorneys for the defendant, Wrightwood Dairy Company, in the above entitled cause; that he has read the foregoing Motion by him subscribed, and that the allegations therein contained are true in substance and in fact.

Alvin E. Stein.

Subscribed and Sworn to before me this 24th day of February, A. D. 1941.
(Seal) Fred J. Ginsberg.

209 And afterwards, to wit, on the 26th day of February, 1941, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Entered Feb. 26, 1941.

210 In the District Court of the United States.

• • (Caption—1211) • •

Wednesday, February 26, A. D. 1941.

Present: Hon. Charles E. Woodward, District Judge.

On motion of defendant's attorney It Is Ordered that the Plaintiff furnish Reporter's Transcript of Evidence.

Entered Jan. 18, 1941.

167 And afterwards, to wit, on the 18th day of January, A. D. 1941, being one of the days of the regular December 1940 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

168 In the District Court of the United States.

• • (Caption—1211) • •

Saturday, January 18, A. D. 1941.

Present: Hon. William J. Campbell, District Judge.

On motion of the United States Attorney It Is Ordered that the plaintiff's time to file its transcript of Record on Appeal in the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby extended to and including February 1, A. D. 1941.

169 And afterwards, to wit, on the 29th day of January, A. D. 1941, being one of the days of the regular December 1940 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

170 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Jan. 29, 1941.
• • (Caption—1211) • •

Wednesday, January 29, A. D. 1941.

Present: Hon. Charles E. Woodward, District Judge.

On motion of the United States Attorney It Is Ordered that the time to file the transcript of Record on Appeal in the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby extended to March 10, A. D. 1941.

377 And afterwards, to wit, on the 10th day of March, 1941, being one of the days of the regular March, term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Mar. 10, 1941.

378 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—1211) • •

Monday, March 10, A. D. 1941.

Present: Hon. Charles E. Woodward, District Judge.

It Is Ordered that the time for filing the record on appeal in the United States Circuit Court of Appeals for the Seventh Circuit be and the same is hereby extended to and including March 13, A. D. 1941.

379 Northern District of Illinois, } ss:
Eastern Division. }

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Designations filed in this Court in the cause entitled United States of America *vs.* Wrightwood Dairy Company, Civil Action No. 1211, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 12th day of March, A. D. 1941.

Hoyt King,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record printed under my supervision and filed on the seventh day of May 1941, in the following entitled causes:

7619

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLEE

7620

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLANT

As the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of November A. D. 1941.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.
By R. HAYS BLANCHARD,
Chief Deputy Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the city of Chicago and begun on the first day of October, in the year of our Lord one thousand nine hundred and forty, and of our Independence the one hundred and sixty-fifth.

426570—41

7619

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLEE

7620

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLANT

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division

And, to wit: On the twenty-seventh day of October 1941, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

Nos. 7619–7620. October Term and Session, 1941

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

October 27, 1941

Before SPARKS, KERNER and MINTON, Circuit Judges.

KERNER, Circuit Judge. These appeals involve an order, known as Order No. 41, issued by the Secretary of Agriculture pursuant to the authority conferred upon him by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. Sec. 601 et seq. The United States brought the action under Sec. 608a (6) of the Act to enforce specifically the provisions of Order No. 41 and "to prevent and restrain" the defendant, Wrightwood Dairy Co., from handling milk in violation of the provisions of the Order. The trial court dismissed the complaint and in accordance with the prayer of defendant's counterclaim directed the issuance of a permanent injunction restrain-

ing the Government, its officers, and agents from enforcing Order No. 41 against the defendant. No. 7619 is an appeal by the United States from the dismissal of the complaint and the granting of the defendant's prayer for relief. No. 7620 is defendant's cross-appeal from certain rulings of the trial court.

The purpose of Order No. 41 was to regulate the handling of milk in the Chicago, Illinois marketing area to the extent that the milk covered was in the current of interstate commerce or directly burdening, obstructing, or affecting such commerce. The mechanics of this type of regulation are so fully discussed in United States v. Rock Royal Co-Operative, Inc., 307 U. S. 533, that it would be bootless to restate them. It is sufficient to say that the plaintiff considered the defendant subject to the regulations of the Order because its handling of the milk was deemed to be in the current of interstate commerce as defined in § 10 (j),[1]—or directly burdened, obstructed, or affected interstate commerce in milk marketed within the area and the defendant therefore was a handler of milk as defined in § 8c (1) of the Act.

It is undisputed, in fact it is conceded that the defendant purchased its total daily milk requirements from approximately 70 producers located entirely within the State of Illinois. It processed the milk in its Chicago plant, never intermingled it with any milk which had crossed the state line, and sold and distributed the processed product solely within the State of Illinois in competition with the milk of other handlers in the marketing area which Order No. 41 sought to embrace. Over 60% of the milk handled in the Chicago Marketing area was produced in the State of Illinois; the remaining milk handled in the area was produced in Wisconsin, Indiana, and Michigan.

The trial court found that the defendant's activities were intrastate, its handling of milk was not in the current of interstate and foreign commerce and "did not directly burden, obstruct, or affect interstate or foreign commerce in milk market with the Chicago marketing area." The court held that the defendant was not a handler of milk as defined in § 8c (1) of the Agricultural Marketing Agreement Act of 1937, and consequently was not subject to the provisions of Order No. 41.

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[1] "(j) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.

The basic question before this court is whether the defendant was subject to the regulations of Order No. 41 as a handler of milk under § 8c (1) of the Act. It is plaintiff's contention that a mere showing of competition by the milk distributor with other handlers operating in a market under the regulation of an order such as No. 41 is sufficient to subject the distributor to the regulations even though its operations are wholly intrastate.

Counsel for plaintiff relies upon United States v. Rock Royal Cooperative, supra. We are not convinced that that case sustains his position. The Supreme Court did not have before it the issue of the applicability of an order to a distributor whose activities were wholly intrastate. In that case the court said (p. 541): "The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid." Further on in the opinion the court said (p. 568): "There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce." It is true that Mr. Justice Reed then said: "Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk." From this we believe the Supreme Court did not intend to preclude this important question, now before us, which was not an issue in the case before it.

The case of United States v. Adler's Creamery, Inc., 107 F. (2) 987 and 110 F. (2) 482 did involve a handler of wholly intrastate milk in the New York Metropolitan marketing area. There the court held that the handler was subject to the provisions of the Order. The court relied upon the Rock Royal case, supra; Currin v. Wallace, 306 U. S. 1, and Mulford v. Smith, 307 U. S. 38. In so far as the court relied upon the inapposite remark made in the Rock Royal case, we do not accept it as persuasive authority for plaintiff's contention.

Currin v. Wallace, supra, and Mulford v. Smith, supra, certainly do not support the plaintiff's contention when applied to the defendant's activity in the case before this court. Currin v. Wallace merely held that Congress could regulate the auction sale of tobacco since almost all of the tobacco there sold was to go into interstate commerce. In Mulford v. Smith the record disclosed that at least two-thirds of all flue-cured tobacco sold at auction warehouses was sold for immediate shipment to an interstate or foreign destination. The court held that the regulation was "of interstate commerce which it reaches and affects at the throat where tobacco enters the stream of commerce, the marketing warehouse." In the instant case, in no such degree was the handling of milk by the defendant associated with interstate commerce.

An examination of the interpretation of the comparable commerce provisions of the National Labor Relations Act likewise fails to show implicit recognition of the broad sweep of authority claimed by the plaintiff in applying Order No. 41.

A study of the various cases construing the commerce clause reveals nothing to support the plaintiff's contention that a finding of competition with interstate handlers was sufficient to subject the defendant in our case to the Act. It is true that cases such as Reid v. Colorado, 187 U. S. 137; Hipolite Egg Co. v. United States, 220 U. S. 45; United States v. Hill, 248 U. S. 420; and United States v. Darby, 312 U. S. 100 prohibit certain movements into interstate commerce, but clearly the milk handled by the defendant was neither in interstate commerce nor ever intended to flow in it. And while Loewe v. Lawlor, 208 U. S. 274; Duplex Printing Press Co. v. Deering, 254 U. S. 443 and Bedford Cut Stone Co. v. Journeymen Stone Cutters, 274 U. S. 37 sanction action under the commerce clause when there is interference with interstate commerce before the actual movement has started, the milk handled by the defendant in our case was never going to get into interstate commerce and impinged upon it only by competing with some milk which had been in interstate commerce. It is also true that the Shreveport Case, 234 U. S. 342; Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563; Currin v. Wallace, supra, and Mulford v. Smith, supra, permit the regulation of intrastate transactions which are closely commingled with or related to the interstate commerce regulated. However, these cases do not extend to the facts before us.

The difference between a direct and indirect effect on commerce is not hard and fast; it is at best a matter of degree. The determination of degree and the resulting allocation of power over commerce rest upon the court, but that determination must ever be within the matrix of the federal system.

In Schechter Poultry Corp. v. United States, 295 U. S. 495, 520, 548, the unreversed findings of the Circuit Court of Appeals, 76 F. (2) 617–618, were that 96% of the chickens involved under the particular code came from interstate commerce to be disposed of in New York; that the practice sought to be regulated not only demoralized the business in New York, but had national repercussions affecting and controlling the prices received by those engaged in interstate commerce. Under such circumstances the court held that the effect upon interstate commerce was only an indirect one and not sufficient to permit Congressional regulation. The effect upon commerce in the case now before us is no more direct than in the Schechter case. The only substantial difference is that in the present case none of the defendant's milk was ever in interstate commerce. The milk's only possible relation to interstate commerce was with some thirty-odd percent of the milk in the area which had been brought into the state, processed, and then sold in competition with defendant's.

To be sure the milk problem is a serious one and apparently for the most effective control requires unified regulations. Cf. Nebbia v. New York, 291 U. S. 502 and Till, "Milk—The Politics of an Industry" at p. 431 of "Price and Price Policies." Unfortunately, if the defendant is not subject to the regulations of Order No. 41, the result may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempt at solution of the problem by the National Government will fail. When a problem of our present day economy requires unified action there sometime is an hiatus in the powers granted to the United States and those not prohibited to the states so that no solution will be possible without the cooperation of states and nation. That hiatus is implicit in a federal system of government. If the powers of the National Government were complete and the states were only administrative agencies whose powers existed solely at the sufferance of the National Government, this difficulty, at least, would cease to exist.

On principle, we are unable to accept plaintiff's contention that "only one factual element is essential to subject a milk distributor whose operations are wholly intrastate in character" to the Order, and that is a showing "that such handler competes with other handlers operating in the market who are subject to the regulation." To do so would be to subscribe to a view of causation which, as Justice Cardozo said in the Schechter case, supra, p. 554, "would obliterate the distinction between what is national and what is local in the activities of commerce."

We conclude that a commodity wholly intrastate in character and handling does not directly burden, obstruct, or affect interstate commerce where the point of impingement of the intrastate transaction upon the interstate transaction is one of competition only.

We now come to a consideration of defendant's cross-appeal by which it is claimed that the District Court failed to find that Order 41 was not in compliance with the law, that it was invalid and unenforceable and that the court erred in sustaining plaintiff's motion to strike defendant's fourth to eleventh defenses. In view of what we have earlier said in this opinion, we do not deem it necessary to discuss the errors assigned. The cross-appeal in No. 7620 will be dismissed. The judgment of the District Court in No. 7619 will be

Affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same today, to wit: On the twenty-seventh day of October 1941, the following further proceedings were had and entered of record, to wit:

Monday, October 27, 1941

Court met pursuant to adjournment

Before Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. OTTO KERNER, Circuit Judge; Hon. SHERMAN MINTON, Circuit Judge.

7619

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

7620

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that this cross-appeal be, and it is hereby, dismissed.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages contain a true copy of the opinion

of the Court, the judgments of the Court in the following entitled causes:

7619

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLEE

7620

THE UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

WRIGHTWOOD DAIRY COMPANY, DEFENDANT-APPELLANT

As the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of November A. D. 1941.

KENNETH J. CARRICK,
Clerk of the United States Circuit Court
for the Seventh Circuit.
By R. HAYS BLANCHARD,
Chief Deputy Clerk.

Supreme Court of the United States

No. 744, October Term, 1941

Order allowing certiorari

Filed December 8, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 783, October Term, 1941

Order allowing certiorari

Filed December 8, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

433840—41

U. S. GOVERNMENT PRINTING OFFICE: 1941

Nos. 744 and 783

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

WRIGHTWOOD DAIRY COMPANY

WRIGHTWOOD DAIRY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION AND CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 744

UNITED STATES OF AMERICA, PETITIONER

v.

WRIGHTWOOD DAIRY COMPANY

No. 783

WRIGHTWOOD DAIRY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION AND CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

The Solicitor General, pursuant to Rule 20, paragraph 3 of this Court moves to advance the above cases for argument on or as near the second day of February 1942 as may be agreeable to the Court.

The milk marketing orders of the Secretary of Agriculture apply only to marketing areas which receive milk in interstate commerce, but they apply

to all of the milk distributed in such areas, whether interstate or intrastate. The decision below holds the Chicago order, and inferentially all others, to be invalid in so far as intrastate milk competing with interstate milk is concerned. Enforcement of the statute against intrastate handlers in the Chicago area is impossible while the decision below stands. The decision may also affect enforcement against intrastate handlers in other areas. To permit intrastate milk in competition with interstate milk for which minimum prices are fixed to go unregulated is, of course, extremely prejudicial to the interstate producers and handlers. In these circumstances it is desirable that the question passed upon by the court below be determined by this Court as soon as is feasible.

We have been advised that these cases would, in the usual course, not be reached for argument until March or April. For the above reasons, it is respectfully requested that the arguments be advanced to the first week of the February session.

CHARLES FAHY,
Solicitor General.

DECEMBER 1941.

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No. 744

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

WRIGHTWOOD DAIRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and order involved	2
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	5
Conclusion	8

CITATIONS

Cases:

Bunte Bros. v. *Federal Trade Commission*, 110 F. (2d) 412, affirmed *sub nom. Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 — 7

Carter v. *Carter Coal Co.*, 298 U. S. 238 — 8

Chicago Board of Trade v. *Olsen*, 262 U. S. 1 — 7

Currin v. *Wallace*, 306 U. S. 1 — 7

Holbrook v. *Wallace*, Civil Action No. 5811 (D. D. C.), decided March 19, 1940 — 6

Labor Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 — 6, 7

Mulford v. *Smith*, 307 U. S. 38 — 7

Railroad Commission of Wisconsin v. *Chicago B. & Q. R. Co.*, 257 U. S. 563 — 7

Schechter Corp. v. *United States*, 295 U. S. 495 — 7

Shreveport Case, 234 U. S. 342 — 7

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 — 8

United States v. *Adler's Creamery Inc.*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657 — 6

United States v. *Andrews*, 26 F. Supp. 123 — 6

United States v. *Darby*, 312 U. S. 100 — 7

United States v. *H. P. Hood & Sons*, 26 F. Supp. 672 — 6

United States v. *Krechting*, 26 F. Supp. 266 — 6

United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533 — 2, 5

United States v. *Schwarz et al.*, Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 — 6

Statute:

Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 670), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246), Sec. 8c (7 U. S. C., Supp. V, Sec. 608c) — 2

Miscellaneous:

Federal Rules of Civil Procedure Rule 56 (d) — 3

4 Fed. Reg. 1259 — 8

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WRIGHTWOOD DAIRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on October 27, 1941.

OPINIONS BELOW

No opinion was rendered by the United States District Court for the Northern District of Illinois, Eastern Division. The District Court's findings of fact and conclusions of law appear in the record (R. 245–247). The opinion of the Circuit Court of Appeals (R. 220) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 220). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether federal regulation of the price of intrastate milk sold in competition with interstate milk is permissible under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937.[1]

STATUTE AND ORDER INVOLVED

The statute involved is Sec. 8c of the Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 670), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246). See 7 U. S. C., Supp. V, Sec. 608c.[2] Sec. 8c permits the Secretary of Agriculture to issue marketing orders fixing minimum prices for milk and other commodities. Paragraph (1) of that section provides that orders issued by the Secretary—

> shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

Pursuant to the provisions of the Act, the Secretary of Agriculture on August 28, 1939, promulgated Order No. 41 regulating the handling of milk in the Chicago area. The Order (printed in the record at R. 8–22) is of the same type as is described in this Court's opinion in the *Rock Royal* case, 307 U. S., at 551–555. It contains provisions for the fixing of minimum prices for milk sold by producers to handlers and for

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[1] There may be other subsidiary or related questions, set forth in the Specification of Errors, *infra*, pp. 4–5, which in the interest of brevity are not spelled out here. If certiorari is granted, petitioner will also urge that the district court had no jurisdiction to enjoin the United States and its officials from enforcing the milk order against respondent.

[2] The statutory provision is the same as that which was before the Court in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533.

a producer-settlement fund to equalize the payments to producers. The Order was issued after a hearing and findings by the Secretary of Agriculture.[3]

STATEMENT

On December 26, 1939, the United States, petitioner herein, filed its complaint in which it sought to compel respondent to comply with Order No. 41 (R. 2–7). Among the numerous defenses set up in respondent's answer (R. 84–101) was the contention that respondent's business was entirely intrastate, and that accordingly the statute was not, and could not constitutionally be, applicable (R. 87–89). The answer also contained a counter-claim praying that the government officials should be enjoined from enforcing Order No. 41 against respondent (R. 99–100).

Petitioner moved for summary judgment on affidavits (R. 105–116). The trial court denied the motion, but found certain facts to exist without controversy (R. 157), and under Rule 56 (d) of the Federal Rules of Civil Procedure the facts so specified are to be deemed established for purposes of the case. The court found that respondent purchased milk from producers within the State of Illinois, processed the milk in Chicago, and sold it in Illinois "in competition with the milk of other handlers in the area" (R. 157–158). None of respondent's milk was physically intermingled with milk which had crossed state lines (R. 158). The court further found that prior to the issuance of Order No. 41, 60% of the milk sold in the Chicago marketing area was produced in Illinois and 40% in Wisconsin, Indiana and Michigan and that at the time of the findings "over 60%" was produced in Illinois (R. 158).

At the trial the transcript of proceedings before the Secretary was introduced in evidence by respondent (R. 201). The

[3] The record before the Secretary of Agriculture was introduced in evidence as Defendant's Exhibits 1–4. This record has not been reprinted, but has been certified to the Court in its original form.

transcript contained evidence showing that 40% of the milk consumed in Chicago came from outside the State of Illinois, and also testimony that producers who sold to handlers competing with cut-rate handlers must reduce their prices in order to permit handlers of their milk to compete successfully.[4] Upon the basis of such evidence, *inter alia*, the Secretary of Agriculture found as a fact (R. 10):

> That all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products; * * *

At the conclusion of the trial the District Court reaffirmed the findings previously made, and added a finding that the defendant's business was "not in the current of" and "did not directly burden, obstruct or affect interstate commerce" (R. 246). The court thereupon dismissed the complaint filed by petitioner and granted the respondent the injunctive relief prayed for in the counter-claim (R. 246–248). The Circuit Court of Appeals affirmed (R. 270).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent was not a handler of milk, as defined in the Act and the Order, subject to the provisions of the Order.

(2) In holding that the business of distributing milk conducted by the respondent in competition with interstate commerce in milk does not directly burden, obstruct or affect such commerce.

(3) In determining the question presented in this case without giving effect to the Secretary's finding, supported by evidence in the record before him, that all milk produced for sale in the area directly affects interstate commerce.

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[4] See Def. Ex. 4 (Original); Transcript of Record before the Secretary of Agriculture, Ex. 2, pp. 10–12, 75–76.

(4) In failing to hold that petitioner's motion for summary judgment should have been granted.

(5) In affirming the decree of the District Court enjoining the United States and its officers from enforcing Milk Order No. 41 against respondent.

(6) In failing to order respondent to comply with said Order.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533. In its opinion in that case this Court stated (p. 568):

> Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines.

Respondent urged in the court below that none of the defendants in the *Rock Royal* case were engaged in intrastate business, and that accordingly the above statement was merely an "erroneous" or "gratuitous" dictum.[5] It is true that this Court also declared in its opinion in the *Rock Royal* case that (p. 568):

> There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce.

But the record in the case shows that, although the issue was not pressed in this Court, the respondent Central New York Cooperative Association, Inc., did challenge the power of Congress to regulate it on the ground that its activites were entirely intrastate.[6]

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[5] See respondent's brief in the Circuit Court of Appeals, pages 40, 35.

[6] The answer of the Central New York Cooperative Association, Inc., alleged that all of the milk handled by it was produced and sold in the state of New York and that none of it crossed state lines or was mixed

2. The decision below is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Adler's Creamery, Inc.*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657. The *Adler* case involved the application of the New York Milk Order to a handler who obtained and distributed all of its milk within the State of New York. The court below refused to accept the *Adler* case as persuasive because of the Second Circuit's reliance on "the inapposite remarks made in the *Rock Royal* case" (R. 222). Neither respondent nor the court below has denied that the *Adler* case conflicts with the decision reached here.

3. The decision below conflicts with the unreversed decisions of five district judges on the same point. *United States* v. *Krechting*, 26 F. Supp. 266 (S. D. Ohio); *United States* v. *Andrews*, 26 F. Supp. 123 (D. Mass., Judge Brewster); *United States* v. *H. P. Hood & Sons*, 26 F. Supp. 672 (D. Mass., Judge Sweeney); *United States* v. *Schwarz et al.*, Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 (Judge Barnes); *Holbrook* v. *Wallace*, Civil Action No. 5811 (D. D. C.), decided March 19, 1940.

4. The decision below conflicts with the fundamental constitutional[7] doctrine that the power of Congress extends to the control of intrastate acts when necessary to the effective regula-

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with other milk which had crossed state lines (October Term 1938, No. 771, Transcript of Record, p. 80). The stipulation on which the case was tried substantiated these allegations, except that it showed that while the Association's milk usually followed a route to New York City entirely within the state of New York, prior to October 1, 1938, the tank trucks often passed through the state of New Jersey en route to New York City, and that when tank trucks were not available the milk was shipped by rail on railroads running through the state of New Jersey (*id.*, pp. 285–287).

[7] Since the statute and marketing order in this case apply in terms to activities which "directly affect interstate commerce" the question of the applicability of the statute is the same as the question of constitutional power. Cf. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30–31. The opinion of the court below demonstrates that the issue was treated as one of constitutional law.

tion or protection of interstate commerce.[8] A program for the establishment of minimum prices for interstate milk cannot be effective if intrastate milk can be sold competitively without restriction. This seems to have been conceded by the court below when it declared (R. 27[illegible]):

> Unfortunately, if the defendant is not subject to the regulations of Order No. 41, the result may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempt at solution of the problem by the national government will fail.

The court below was of opinion that the fact that the unregulated intrastate transactions were in competition with similar interstate transactions was not sufficient to bring the former within the federal commerce power.[9] But in the *Shreveport Case* itself the federal regulation of intrastate railroad rates was upheld precisely because of competitive discrimination against interstate rates.[10] The ruling below is thus inconsistent not only with the familiar principle for which the *Shreveport Case* stands, but also with the decision on its facts. Also closely in point is the language in the dissenting opinion of

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[8] *Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Schechter Corp.* v. *United States*, 295 U. S. 495, 544–546; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36–38; *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Darby*, 312 U. S. 100, 121.

[9] In *Bunte Bros.* v. *Federal Trade Commission*, 110 F. (2d) 412 (C. C. A. 7), affirmed *sub nom. Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, the court below and this Court held the Federal Trade Commission Act inapplicable to intrastate sales competing with interstate on the ground that that act applied only to transactions in interstate commerce and not to those "affecting" such commerce. Both opinions in the *Bunte* case seem to imply that the constitutional power of Congress unquestionably extends to the transactions in question. The statute involved in the present case contains the language omitted from the Federal Trade Commission Act.

[10] In *Schechter Corp.* v. *United States*, 295 U. S. 495, 546, this Court stated that "Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, * * * the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce."

Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329, with respect to the fixing of minimum prices for coal: [11]

> Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. * * *

5. The question presented is one of great public importance and should be settled. At the present time federal orders regulating the handling of milk are in effect in twenty widely separated marketing areas. In every one of these areas there is a substantial number of handlers whose business is wholly intrastate in character. The inherent nature of the regulation embodied in each of these orders is such that unless uniformly applied to all handlers in the marketing area, the order cannot operate. Indeed, the New York Milk Order was suspended when the adverse decision below made it impossible to obtain uniform compliance. See 4 Fed. Reg. 1259; *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S., at 555.

CONCLUSION

It is respectfully submitted that, for the reasons stated, this petition for writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

NOVEMBER, 1941.

[11] The majority of the Court in the *Carter* case did not pass on the price fixing provisions of the Coal Act. The views expressed in the opinion of Mr. Justice Cardozo were approved by this Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
The Order involved	4
Statement	7
Specification of errors to be urged	10
Summary of argument	10
Argument:	
Part One	14
I. The intrastate distribution of milk in competition with interstate commerce is subject to regulation under the Agricultural Marketing Agreement Act	14
A. The cases involving milk orders dispose of both the constitutional and statutory questions	14
B. Congress has the power under the commerce clause to regulate intrastate transactions which compete with interstate	18
C. The statute authorizes the Secretary of Agriculture to regulate intrastate transactions which compete with interstate	27
1. The language of the Act	27
2. Legislative history	29
II. The District Court had no jurisdiction to issue an injunction against the United States	39
Part Two	40
I. The order was issued in full compliance with the applicable statutory provisions	41
A. The order is based upon a hearing initiated and conducted in accordance with law	43
B. The Secretary properly determined the applicable base period	46
C. The Secretary properly determined that the order had received the requisite producer approval	52
D. The Secretary defined the marketing area in the order in accordance with the terms of the statute	56

435553—42——1

Argument—Continued.
Part Two—Continued. Page

II. The Act contains no invalid delegation of legislative power 39
III. The Act is not void because in conflict with federal and state antitrust laws 61
IV. The case is not moot 62
Conclusion 65
Appendix A 67
Appendix B 89

CITATIONS

Cases:
Adams v. *Nagle*, 303 U. S. 532 51
Bear Lake Irrigation Co. v. *Garland*, 164 U. S. 1 ..... 62, 63
Carmichael v. *Southern Coal Co.*, 301 U. S. 495 58
Carter v. *Carter Coal Co.*, 298 U. S. 238 ..... 24, 26
Chicago Board of Trade v. *Olsen*, 262 U. S. 1 23
Currin v. *Wallace*, 306 U. S. 1 23
Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349 26
Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 64
Gibbons v. *Ogden*, 9 Wheat. 1 26
Hadden v. *Merritt*, 115 U. S. 25 51
Head Money Cases, 112 U. S. 580 27
Heald v. *District of Columbia*, 259 U. S. 114 60
Henneford v. *Silas Mason Co.*, 300 U. S. 577 60
Hood & Sons, H. P. v. *United States*, 307 U. S. 588 ..... 41, 46, 49, 56
Lipson v. *Socony Vacuum Corp.*, 87 F. (2d) 265 19
McCulloch v. *Maryland*, 4 Wheat. 316 23
Minnesota Rate Cases, 230 U. S. 352 26
Mulford v. *Smith*, 307 U. S. 38 23
Nassau Smelting Works v. *United States*, 266 U. S. 101 40
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601 16
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 ..... 23, 24, 28
New York Handkerchief Mfg. Co. v. *National Labor Relations Board*, 114 F. (2d) 144, certiorari denied, 311 U. S. 704 53
Opp Cotton Mills v. *Administrator*, 312 U. S. 126 21
Panama Refining Co. v. *Ryan*, 293 U. S. 388 64
Postdas v. *National City Bank*, 296 U. S. 497 ..... 62, 63
Premier-Pabst Co. v. *Grosscup*, 298 U. S. 226 60
Railroad Commission of Wisconsin v. *Chicago B. & Q. R. Co.*, 257 U. S. 563 ..... 23, 24
Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316 51
Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453 16
Schechter Corp. v. *United States*, 295 U. S. 495 ..... 23, 25, 27, 31, 32

Cases—Continued. Page

Schill v. *Remington-Putnam Book Co.* (Md.), 17 A. (2d) 175 19
Shreveport Case, 234 U. S. 342 23, 24, 36
Southern Pacific Terminal Company v. *Interstate Commerce Commission*, 219 U. S. 498 64
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381 25, 27
United States v. *Adler's Creamery*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657 16, 17
United States v. *Andrews*, 26 F. Supp. 123 18
United States v. *Darby*, 312 U. S. 100 23
United States v. *Grimaud*, 220 U. S. 506 61
United States v. *H. P. Hood & Sons*, 26 F. Supp. 672 18
United States v. *Krechting*, 26 F. Supp. 266 18
United States v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533 10, 14, 15, 16, 24, 41, 49, 57, 61, 63
United States v. *Schwarz et al.*, Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 18
United States v. *Shaw*, 309 U. S. 495 11, 40
United States v. *The Thekla*, 266 U. S. 328 40
Virginian Ry. Co. v. *System Federation*, 300 U. S. 515 53, 60
West v. *Hitchcock*, 205 U. S. 80 51

Statutes:

Act of May 12, 1933, 48 Stat. 31, as amended 3, 29, 30
Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C., Supp. V, Secs. 601 *c*, *et seq* 2, 4, 30
Sec. 8c (18) 2, 4, 13, 60
Sec. 10 (e) 2, 13
Bituminous Coal Act of 1937, 50 Stat. 72, 15 U. S. C., Secs. 831, 834 27
National Labor Relations Act, 49 Stat. 449, 29 U. S. C., Secs. 160, 152 (7) 28

Miscellaneous:

79 Cong. Rec. 8239–8242, 9479–9480, 9485, 11134–11140 33, 34, 35, 36, 37, 38
12 C. J. 237 19
4 Fed. Reg. 2366, 3764, 3770 4, 42, 43, 47, 53
Federal Rules of Civil Procedure, Rule 13 (d) 40
H. R. 5585, 74th Cong., 1st Sess. 31
H. R. 7713, 74th Cong., 1st Sess. 31
H. R. 8052, 74th Cong., 1st Sess. 31
H. Rep. 808, 74th Cong., 1st Sess. 31
H. Rep. 952, 74th Cong., 1st Sess. 31
H. Rep. 1241, 74th Cong., 1st Sess. 28, 29, 31
S. 1807, 74th Cong., 1st Sess. 30
S. Rep. 548, 74th Cong., 1st Sess. 30
S. Rep. 1011, 74th Cong., 1st Sess. 28, 31
Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 26
Story, *Commentaries on the Constitution* (5th ed.) Sec. 1082 27

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OPINIONS BELOW

No opinion was rendered by the United States District Court for the Northern District of Illinois, Eastern Division. The District Court's findings of fact and conclusions of law appear at R. 245–247. The opinion of the Circuit Court of Appeals (R. 270) is reported at 123 F. (2d) 100.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 275). The petition for certiorari in No. 744 was filed November 14, 1941, and the cross-petition for certiorari in No. 783 was filed December 4, 1941. Both petitions were granted December 8, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In No. 744 the questions presented are:

(1) Whether federal regulation of the price of intrastate milk sold in competition with interstate milk is permissible under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937.

(2) Whether the District Court had jurisdiction to enter an injunction against the United States.

In No. 783 the following additional questions are presented:

(3) Whether Sections 8c (18) and 10 (c) of the Agricultural Marketing Agreement Act of 1937 contain unconstitutional delegations of legislative power.

(4) Whether the Act is invalid because of conflict with the federal and Illinois antitrust laws.

(5) Whether Order No. 41 was not issued in compliance with the Act:

(a) Because, although a hearing had been held on a proposed marketing agreement and order, no hearing was held upon a proposal precisely identical to the order as finally issued.

(b) Because the Secretary's findings and proclamation as to the applicable base period were set forth in a separate document instead of being included in the order.

(c) Because the Secretary found that two-thirds of the producers participating in the referendum (as distinguished from two-thirds of all producers) favored the order, and limited participation in the referendum to persons producing milk qualified and available for sale in the marketing area as fluid milk.

(d) Because the Secretary did not include in the marketing area all cities and towns in the immediate vicinity.

(6) Whether the case is moot because the Secretary amended Order No. 41 after this proceeding was instituted.

STATUTE INVOLVED

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 672), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the

Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246, 7 U. S. C., Supp. V, Secs. 601 c, *et seq.*), herein referred to as the "Act." Section 8 (c) permits the Secretary of Agriculture to issue marketing orders fixing minimum prices for milk and other commodities. Paragraph (1) of that Section provides that orders issued by the Secretary—

> shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

An annotated compilation of the Act is attached to this brief as "Appendix A."

THE ORDER INVOLVED

The regulation involved is Order No. 41, Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture, on August 28, 1939, effective September 1, 1939 (4 Fed. Reg. 3764). The order is printed in the record at pp. 8–22. It is of the same type as is described in the opinion of this Court in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 551–555.

The order contains a finding (R. 10):

> That all milk which was produced for sale in the marketing area is handled in the

> current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products; * * *

The order applies to (R. 11):

> * * * such handling of milk in the Chicago, Illinois, marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce, * * *.

The plan of regulation embodied in the order provides [1] for the classification of milk according to its use,[2] and establishes a formula for calculating the minimum price to be paid for each class of milk. The total cost of milk to a handler [3] for each month is arrived at by multiplying the quantity of milk used during the month by the handler in each of the classifications by the applicable minimum price for that class and adding together the totals.

The cost of milk to a handler is not, however, the same as the price paid producers. The price

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[1] A detailed explanation of the terms of the order may be found in the affidavit of Mr. Cladakis, the market administrator, appearing in the record at pp. 24–27, and in the affidavit of Mr. Reed, Acting Chief of the Dairy Section, Department of Agriculture, appearing in the record at pp. 34–40.

[2] The three use classes in the original order were: I—fluid milk; II—cream, ice cream, cottage cheese, and flavored milk; III—other uses (R. 14).

[3] A handler is the processor who purchases the milk from the producers (R. 11).

which is paid to the producers for each delivery period is called the "uniform price" or the "blended price"; this is arrived at by dividing the total cost of milk to all handlers in the market during a delivery period by the total quantity of milk purchased by the handlers.[4]

Payment of the uniform price to all producers supplying the market is effected through what is called the producer-settlement fund, maintained by the market administrator. Each handler whose total cost of milk at the class prices for a particular delivery period is greater than his total payments to producers at the "uniform price" pays such difference into the producer-settlement fund. Each handler whose total cost of milk is less than his total payments at the "uniform price" draws

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[4] The reason for the "uniform price" is described as follows (R. 25-26):

"The plan incorporated in the order for paying producers is simply a plan whereby all producers receive a uniform price for their milk. It is commonly called the equalization plan. Equalization of fluid milk sales is simply an extension of the same plan for paying producers which has always been used by each handler and by cooperatives. If a creamery used 75 percent of its milk as fluid milk and the remainder as cream, it did not pay 75 percent of its producers the fluid milk price and the remaining 25 percent the cream price. Such a method obviously would have been inequitable even if possible. Instead, each producer received the fluid milk price of 75 percent of his milk and the cream price for the remaining 25 percent. In the same way the plan in the order distributes the proceeds from the total sales of milk in the whole market among all producers. Each producer is assured an equitable share of the market, no matter how the handler to whom he delivers milk utilizes such milk."

the amount of such difference from the producer-settlement fund.

STATEMENT

On December 26, 1939, the United States filed its complaint in which it sought to compel Wrightwood Dairy (herein called respondent) to comply with Order No. 41 (R. 2–7). Respondent's answer did not deny that respondent was violating the order (R. 86). The answer averred, however, that respondent's business was entirely intrastate, and that accordingly the statute was not and could not constitutionally be applicable (R. 87–89). The answer further averred, both by way of denial and in the fourth to eleventh defenses (R. 89–99), that for numerous other reasons, summarized in "Questions Presented," Nos. 3 to 5, *supra*, pp. 2–3, the Secretary's order was invalid (R. 89–99). The answer contained a counterclaim praying that the United States, its officers and agents be enjoined from enforcing Order No. 41 against respondent (R. 99–100). Respondent subsequently amended its answer so as to add a "twelfth defense" averring that the case had become moot by reason of an amendment to Order No. 41 (R. 118).

The United States moved for summary judgment on affidavits (R. 105–116). District Judge Woodward denied the motion, but on the basis of the affidavits and pleadings found certain facts to exist without controversy (R. 157). Under Rule 56 (d) of the Federal Rules of Civil Procedure

the facts so specified are to be deemed established for purposes of the case.

The court made the following findings: Respondent was not complying with Order No. 41 (R. 157). Respondent purchased milk from producers within the State of Illinois, processed the milk in Chicago, and sold it in Illinois "in competition with the milk of other handlers in the area" (R. 157–158). None of respondent's milk was physically intermingled with milk which had crossed state lines (R. 158). Prior to the issuance of Order No. 41, 60 percent of the milk sold in the Chicago marketing area was produced in Illinois and 40 percent in Wisconsin, Indiana, and Michigan, and at the time of the findings "over 60 percent" was produced in Illinois (R. 158). There was a genuine question of fact as to whether the Secretary's order had been issued in full compliance with the law (R. 158).

The United States filed motions to dismiss respondent's counterclaim (R. 101) and to strike the third to eleventh defenses of respondent's answer (R. 156). These motions were argued at the beginning of the trial. The court denied the motion to dismiss the counterclaim and the motion to strike the third defense, which raised the interstate commerce question, but granted the motion to strike the fourth to eleventh defenses (R. 244).

At the trial respondent introduced into evidence the complete record of the public hearing conducted by the Secretary prior to the issuance of

the order (R. 200–201).[5] Respondent also introduced in evidence excerpts from the legislative history of the Act (R. 202–217), and a portion of the Government's pleadings (R. 201). Oral testimony was taken with respect to the list of persons permitted to vote in the referendum conducted by the Secretary among producers prior to the issuance of the order (R. 218–231).

At the close of the trial the court stated that the findings made on the motion for summary judgment would be adopted, and that two additional findings would be made, namely, (1) "that the order was issued by the Secretary in full compliance with law and all conditions precedent to the effectiveness of said order have occurred," and (2) "that the business of the defendant was not in the current of interstate commerce and did not burden, obstruct, or in any way affect interstate or foreign commerce" (R. 243, 245–246).

On October 31, 1940, the court filed its findings of fact and conclusions of law (R. 244–247) and entered final judgment dismissing the complaint and granting the respondent the injunctive relief prayed for in the counterclaim (R. 247–248). The Circuit Court of Appeals affirmed (R. 275), on the ground that the commerce clause of the Constitution did not empower Congress to regulate intrastate transactions impinging upon inter-

[5] The volumes of this record have been filed with the Court as original exhibits.

state transactions through "competition only" (R. 274).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent was not a handler of milk, as defined in the Act and the order, subject to the provisions of the order.

(2) In holding that the business of distributing milk conducted by the respondent in competition with interstate commerce in milk does not directly burden, obstruct or affect such commerce.

(3) In affirming the decree of the District Court enjoining the United States and its officers from enforcing Milk Order No. 41 against respondent.

(4) In failing to order respondent to comply with said order.

SUMMARY OF ARGUMENT

PART ONE

I

A. In *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, this Court recognized the authority of Congress to regulate wholly intrastate milk which directly affected the marketing of interstate milk, and many lower courts have also applied the Act to intrastate milk competing with interstate milk. These decisions are directly in point here.

B. The exemption from minimum-price regulation of intrastate handlers who compete with dealers in milk coming from other states seriously dis-

criminates against and injures the latter, and tends to render ineffective the regulation as applied to interstate commerce. In such circumstances Congress has power under the commerce clause to regulate the intrastate transactions as well as the interstate.

C. Respondent contends that Congress did not intend the Act to apply to intrastate transactions. The statute and marketing order apply to the handling of milk "in the current of * * * or which directly * * * affects, interstate or foreign commerce." The expression "directly affects" shows that Congress meant to employ all of its Constitutional power over the subject matter. The legislative history of the Act points to the same conclusion. The most that can be said for respondent's viewpoint is that the legislative history is ambiguous; but this would not be enough to overcome the plain language of the law.

II

The District Court had no jurisdiction to issue an injunction against the United States by way of counterclaim since the United States has not consented to be sued. *United States* v. *Shaw*, 309 U. S. 495.

Part Two

I

There is no merit in respondent's contention that the Secretary failed to comply with the provisions of the Act in issuing Order No. 41.

1. The statute does not require that the final order be precisely identical to the proposal upon which the hearing is held. Section 8c (10) of the Act merely requires that the order regulate in the same manner the same classes of persons. The obvious purpose of this provision is to insure that all persons affected by the order have had an opportunity to be heard on the scheme of regulation.

2. The Secretary, by separate proclamation, adopted the base period permitted by Section 8e of the Act because he found that satisfactory statistics were not available for the base-period provided in Section 2. There is no requirement in the statute that the Secretary's finding and proclamation must be contained in the order itself. Although we believe that the Secretary's finding under Section 8e is not reviewable, the evidence taken at the administrative hearing supports the finding.

3. The Secretary found on the basis of a referendum conducted pursuant to Section 8c (19) that the Order was approved or favored by two-thirds of the producers who participated in the referendum. That finding is sufficient to meet the requirements of Section 8c (9), particularly in view of the provisions in Section 8c (19) that the affirmative vote of two-thirds of those participating must be held to meet the statutory requirements in regard to producer approval. The Sec-

retary did not err in refusing to allow persons producing milk solely for manufacturing purposes to participate in the referendum. The order regulates the handling of fluid milk and is for the benefit of producers engaged in the production of milk for consumption as fluid milk. Since other producers were not concerned in the result of the referendum, there was no reason to allow them to participate.

4. Respondent was not discriminated against by the fact that cities and towns adjacent to the marketing area were not included within the area. All handlers selling milk within the marketing area must pay the prices fixed by the order. However, if a handler sells part of his milk outside the area, he is only required to pay the prevailing prices in the area in which the milk is sold. The Secretary had to draw the line at some point, and the evidence taken at the administrative hearing amply supports his decision in this case.

II

Sections 8c (18) and 10 (c) do not contain invalid delegations of legislative power. Nor does it appear that any orders or regulations issued under them have been in any way prejudicial to respondent.

III

The Act is not void because in conflict with the federal and Illinois antitrust laws.

IV

The case is not rendered moot by reason of the amendment to Order No. 41.

ARGUMENT

PART ONE

I

THE INTRASTATE DISTRIBUTION OF MILK IN COMPETITION WITH INTERSTATE COMMERCE IS SUBJECT TO REGULATION UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT

The court below held that it would be unconstitutional to subject respondent's intrastate transactions to federal regulation. Although respondent has not abandoned this constitutional contention, it places greater emphasis upon the argument that Congress did not intend the statute to apply to such transactions. We shall show that these contentions are both foreclosed by decision and patently unsound.

A. THE CASES INVOLVING MILK ORDERS DISPOSE OF BOTH THE CONSTITUTIONAL AND STATUTORY QUESTIONS

The cases which deal with and uphold the applicability to intrastate milk of marketing orders issued under the same statutory provisions as are involved here are directly in point on both the constitutional and the statutory questions.

In *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 568, which involved the mar-

keting order for the New York area, this Court stated:

> Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines.

Respondent has characterized the above statement as an "erroneous" or "gratuitous" dictum,[6] and the court below declared it to be an "inapposite remark" (R. 272). It is true that other expressions in the *Rock Royal* opinion show that this Court assumed that all of the milk involved moved through the channels of interstate commerce (307 U. S., at 540, 541, 568). The record in the case shows, however, that, although the issue was not pressed in this Court, the defendant Central New York Cooperative Association, Inc., did challenge the power of Congress to regulate it on the ground that its activities were entirely intrastate and that its milk was usually handled entirely intrastate.[7]

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[6] See respondent's brief in the Circuit Court of Appeals, pp. 40, 35.

[7] The answer of the Central New York Cooperative Association, Inc., alleged that all of the milk handled by it was produced and sold in the state of New York and that none of it crossed state lines or was mixed with other milk which had crossed state lines (October Term, 1938, No. 771, Transcript of Record, p. 80). The stipulation on which the case

Whether or not this Court's remark in the *Rock Royal* case was dictum, we submit that it certainly was not erroneous. That it was a deliberate statement of the correct rule was the view of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Adler's Creamery*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657. That case involved the applicability of the New York milk order to a company in exactly the same position as is respondent here. The Adler Company handled milk produced and transported entirely within the State of New York and not commingled with milk from other states. About half[8] of the milk sold within the area came from outside the state and was sold in competi-

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was tried substantiated these allegations, except that it showed that while the Association's milk usually followed a route to New York City entirely within the state of New York, prior to October 1, 1938, the tank trucks often passed through the state of New Jersey en route to New York City, and that when tank trucks were not available the milk was shipped by rail on railroads running through the state of New Jersey (*id.*, pp. 265–267).

[8] The opinion in the *Rock Royal* case indicated that at that time approximately two-thirds of the milk produced for the New York area moved in interstate commerce (307 U. S., at 551–552). Respondent attempts to distinguish the cases involving the New York order on the ground that only 40 per cent of the milk in the Chicago area came from outside the state. The difference between 40 per cent interstate and 50 per cent or 66⅔ per cent is obviously immaterial. Cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453 (37 per cent interstate commerce); *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

tion with the intrastate milk. The court said (107 F. (2d), at 989–990):

> We interpret the decision in *United States* v. *Rock Royal Co-operative, Inc.*, supra, to mean that milk which has not crossed a state line but which is distributed in a marketing area in such a way that its marketing is merely part of what is from the public standpoint one marketing operation which includes interstate milk may be the subject of federal regulation whenever that is necessary to prevent a direct burden upon or obstruction to the coming of interstate milk into the marketing area. * * * What is, or is likely to be, such a burden or obstruction must be determined from the nature of the need for protection and where that need has been created by lawful marketing control of interstate commodities the scope of such protection covers the field, when necessary, of the similar marketing control of intrastate commodities. *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441; *Mulford* v. *Smith*, 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092. Accordingly, the facts justifiably found below are sufficient to require us to hold that the appellant is a handler of milk who is bound to comply with the provisions of Order No. 27.

Every district court which has passed upon the question, apart from the instant case, has also come to the conclusion that intrastate milk com-

peting with interstate is subject to milk orders issued under the Agriculture Marketing Agreement Act. *United States* v. *Krechting,* 26 F. Supp. 266 (S. D. Ohio); *United States* v. *Andrews,* 26 F. Supp. 123 (D. Mass., Judge Brewster); *United States* v. *H. P. Hood & Sons,* 26 F. Supp. 672 (D. Mass., Judge Sweeney); *United States* v. *Schwarz et al.,* Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 (Judge Barnes).

B. CONGRESS HAS THE POWER UNDER THE COMMERCE CLAUSE TO REGULATE INTRASTATE TRANSACTIONS WHICH COMPETE WITH INTERSTATE

The district court found, and it is uncontroverted, that respondent's milk is sold "in competition with the milk of other handlers in the area" (R. 245), and that approximately 40 per cent of the milk distributed in the area comes from outside of Illinois (R. 246).[9] It is also apparent from these facts that in the purchase of milk from producers respondent competes with other handlers

[9] The finding was that "less than 40 per cent is brought in" from other states and that 40 percent was brought in "prior to the issuance of Order No. 41" (R. 246). The record shows that the proportion of interstate milk was approximately 40 percent (R. 33–34; Def. Ex. 4 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 2, pp. 10–12), although an affidavit filed by respondent's president states generally that "he is informed and believes" that "less than 40 percent of the milk" is imported into Illinois (R. 45).

who buy their milk both in interstate and in intrastate commerce.

The term "competition" as used in the findings describes a dynamic and frequently complex economic relationship. The finding that the milk processed by respondent competes with other milk, including milk from outside the state, means that respondent and other handlers are struggling as "rivals for the same trade." *Lipson* v. *Socony Vacuum Corporation*, 87 F. (2d) 265, 270; *Schill* v. *Remington-Putnam Book Co.* (Md.), 17 Atl. (2d) 175, 178 (1941); 12 C. J. 237. Where such rivalry exists, it is inevitable that the imposition of restrictions upon some of the protagonists and not upon others will greatly injure the business of those whose freedom of action is restricted.

Although we believe that the unchallenged finding of "competition" necessarily carries with it this connotation [10] without reference to other portions of the record, it may be noted that the record does show in more detail that both the handlers of interstate milk and the farmers who produce it will be harmed if intrastate milk is exempt from regulation. The uncontroverted affida-

[10] We assume that the district court meant the word "competition" to have its ordinary significance. The record upon which the Court's findings were based (see Note 11, *infra*) required that the term have this meaning.

vits upon which the finding was based [11] declared (R. 34, 39):

> The plan of regulation prescribed by the Agricultural Marketing Agreement Act of 1937 and Order No. O–41, issued pursuant thereto, is such that it must, by reason of the economic forces inherent in it, be applicable to all handlers in the market, regardless of whether their marketing of milk is wholly intrastate in character or interstate in character. If handlers whose marketing of milk in the marketing area is wholly intrastate in character were exempted from compliance with Order No. O–41, and the plan of regulation were applicable only to handlers in the market whose marketing is interstate in character, the latter handlers would suffer serious discrimination. * * *
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> * * * * * *
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> Those handlers who are participating in the equalization program cannot continue to meet the competition of noncomplying handlers who are receiving their milk at a

[11] At the close of the trial the district court adopted, in so far as the facts showing interstate commerce and competition were concerned, the findings previously made on the motion for summary judgment (R. 243; cf. R. 245–246 and 159–160). No additional evidence had been introduced on this point (although the record before the Secretary subsequently introduced in another connection contained material pertinent to the commerce issue). The undisputed allegations in the affidavits on the motion for summary judgment (R. 24–41, 43–60, 112–116, 142–143) are thus the record upon which the court's findings on this issue were based.

> lower cost, and sooner or later destructive competition will set in and prices will be reduced to ruinously low levels. The cost of competition is usually borne by producers and thus the supply and quality of milk to consumers is greatly endangered.

An economic analysis of the milk-marketing problem,[12] introduced as an exhibit in the record before the Secretary of Agriculture (Def. Ex. 4 (Original), Ex. 2, pp. 75–76) states:

> Producers selling milk to handlers competing with the handler who sells cut-rate milk find that they also must reduce prices in order that the handlers purchasing their milk may compete successfully and maintain their share of the market. Thus, the entire price structure is threatened, and it is probable that if the price is lowered due to such competitive conditions, no group will have gained a permanent advantage and all producers will have suffered severe losses due to such ill-advised practices. * * *

The inequality and unfairness of a system of regulation not uniformly applicable to all competitors was also stressed by witnesses opposing issuance of a milk order at the hearing before the Secretary; they assumed that such an order could not be uniformly enforced, and that they would be

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[12] Such evidence may properly be considered. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 154–155.

unable to withstand the competition of those who did not comply.[13]

It is, of course, obvious that a handler not complying with the minimum price system established under an order will have advantages over his competitors. He will be able to pay the producers less than his rivals are required to pay,[14] and thus will be in a position to undersell them on the market. In order to protect themselves competitors will seek to reduce the amounts they pay producers, and inevitably the entire price structure, interstate and intrastate, will collapse. A price order applicable only to interstate transactions would thus either be unworkable or would cause grievous injury to and discrimination against the interstate dealings of those subjected to it. This seems to have been conceded by the court below, when it declared (R. 274):

> * * * Unfortunately, if the defendant is not subject to the regulations of Order

[13] Def. Ex. 3 (Original), pp. 281–282, 316–317, 360–361. Testimony of these witnesses was based on experience under a license issued under the predecessor to the statute here involved.

[14] An unregulated handler selling mainly Class I milk could pay producers substantially less than the price received by other producers for the higher priced Class I milk, and yet pay as much as or more than the "uniform price" to all producers, which is the average price for Classes I, II, and III combined. See the illustration given at R. 39. Such a handler would have an advantage over others in the sale of Class I milk, and would force his competitors to seek reduced prices from producers in order to retain their markets.

> No. 41, the result may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempt at solution of the problem by the National Government will fail. * * *

The existence of competition between interstate and intrastate commerce thus presents a situation where Congress will not be able effectively to regulate prices for interstate sales of milk from producers to handlers unless intrastate sales are similarly controlled.

The Court has frequently held that the commerce power extends to the regulation of intrastate acts when necessary to make the control of interstate commerce effective. *Shreveport Case,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.,* 257 U. S. 563; *Chicago Board of Trade* v. *Olsen;* 262 U. S. 1; *Schechter Corp.* v. *United States,* 295 U. S. 495, 544–546; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 36–38; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Darby,* 312 U. S. 100, 121. This principle is merely an application of the basic constitutional doctrine, embodied in the "necessary and proper" clause but implied in any event (*McCulloch* v. *Maryland,* 4 Wheat. 316), which permits Congress to choose the means appropriate to the accomplishment of a purpose within the federal power, even though the means

itself might not expressly fall within the powers granted. *United States* v. *Darby*, 312 U. S., at 121, and cases cited.

The existence of competition between interstate and intrastate commerce, such as in the case at bar, has been regarded and treated as presenting the typical, as well as perhaps the simplest, situation to which the doctrine is applicable. In the *Shreveport Case*, 234 U. S. 342, the federal regulation of intrastate railroad rates was upheld precisely because of competitive discrimination against interstate rates. See also, *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563.[15] The passage from the *Nock Royal* case (quoted, *supra*, p. 15), whether or not dictum, which states that the federal authority over intrastate milk was recognized without question is strong indication that neither the Court nor the litigants in that case had any doubt as to the applicability of the *Shreveport* doctrine to the marketing of milk. Also directly in point is the statement from the dissenting opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329,[16] with respect to the fixing of minimum prices for coal—

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[15] Respondent's suggestion that the principle applicable to agencies of transportation cannot be given effect elsewhere is clearly unsound. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42. Many of the cases referring to the doctrine are not concerned with transportation.

[16] The majority of the Court in the *Carter* case did not pass on the price-fixing provisions of the Coal Act. The

> Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. * * *

That the discrimination against interstate commerce resulting from the failure to control competing intrastate transactions constitutes a "direct effect"[17] upon interstate commerce subject to federal regulation was specifically recognized in *Schechter Corp.* v. *United States*, 295 U. S. 495, 546, upon which respondent mainly relies;[18] the Court there stated that—

> Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, * * * the

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views expressed in the opinion of Mr. Justice Cardozo were approved by this Court in *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

[17] Respondent incorrectly states (Brief in opposition, p. 2) that we do not contend that its milk directly burdens or affects interstate commerce where "the point of impingement of the intrastate transaction is one of competition only." On the contrary, we think it clear that the existence of a competitive relationship affords the best illustration of a "direct effect."

[18] The *Schechter* case did not, of course, involve competition between interstate and intrastate dealings. The Government sought to show that local practices affecting competition between intrastate merchants selling at wholesale or retail in New York City affected the general price structure in the industry and thereby affected commerce in the poultry coming into New York City from other states. This Court regarded such an effect as indirect.

fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce.

In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, a case involving the construction of a statute which was not in terms applicable to transactions *affecting* interstate commerce, this Court implied that the constitutional power of Congress (as distinguished from the statute before the Court) extended to the control of intrastate sales competing with interstate (p. 355); the dissenting opinion stated that the exercise of power involved in that case was "admittedly constitutional" (p. 358).

The court below was peculiarly unperturbed by the fact that its view as to the scope of federal power left a hiatus where neither state nor nation could effectively function (R. 274). The design of the framers of our Constitution was that local matters were to be left to the states, but that subjects which the states were separately incompetent to handle were to be subjected to the control of the nation.[19] That the enumerated powers, including particularly the commerce clause, were intended to be construed so as to avoid any hiatus is clear both from the history of the Constitution and from the decisions of this Court.[20]

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[19] See Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335.

[20] *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195; *Minnesota Rate Cases*, 230 U. S. 352, 398; *Carter* v. *Carter Coal Co.*, 298 U. S.

C. THE STATUTE ANTHORIZES THE SECRETARY OF AGRICULTURE TO REGULATE INTRASTATE TRANSACTIONS WHICH COMPETE WITH INTERSTATE

1. *The language of the Act.*

Respondent seems to argue that the Act was not intended to apply to intrastate milk, even where such regulation would be constitutional. The language of the statute plainly refutes this contention. Section 8c (1), which authorizes the issuance of marketing orders, specifically provides that—

> Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

The language used, and particularly the phrase "directly * * * affects," is taken from decisions of this Court defining the scope of congressional power over intrastate transactions. *E. g., Schechter Corp.* v. *United States,* 295 U. S. 495, 546. The terms employed are those which Congress has frequently used in enacting commerce regulations which go to the limits of its constitutional power. Cf. Bituminous Coal Act of 1937, Secs. 4, 4–A, 50 Stat. 72, 15 U. S. C., §§ 831,

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238, 326 (dissent); *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 396; *Head Money* Cases, 112 U. S. 580, 593; Story, *Commentaries on the Constitution* (5th Ed.), Sec. 1082.

834; National Labor Relations Act., Secs. 10 (a), 2 (7), 49 Stat. 449, 29 U. S. C., §§ 160, 152 (7); see *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S., at 30–31.

The use of the expression "directly affects" thus demonstrates that Congress intended that the Secretary possess all the constitutional power of the Federal Government over the subject to be regulated. This also appears from the committee reports, which expressly state that (H. Rep. 1241, S. Rep. 1011, 74th Cong., 1st Sess., R. 208):

> * * * the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.

The reports further declare (R. 207) that—

> The powers to be exercised under the proposed bill are confined within the limitations upon the Federal Authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases.

Respondent appears to argue (br. in opp., p. 12) that the statute authorizes the Secretary to control only products which are in the current of interstate or foreign commerce and which *also* directly burden, obstruct, or affect interstate commerce. The construction suggested completely

ignores the word "or," which shows that the two expressions are intended to be in the alternative. Indeed, the expression interpreted without the "or" is scarcely susceptible of an intelligent meaning.[21]

2. *Legislative history.*

Respondent relies on the committee reports and debates upon the floor of Congress to show that Congress did not intend that marketing orders be applicable to intrastate transactions competing with interstate. We submit that the legislative history tends to support a literal construction of the language of the Act, rather than the contrary. The most that can be said from respondent's viewpoint is that the legislative history is ambiguous. In such circumstances, when the terms of a statute are as clear as in the instant case, little weight can be given legislative history.

(a) *The committee reports.*—Section 8 (3) of the Agricultural Adjustment Act of 1933, 48 Stat. 31, 35, provided for the issuing of licenses to per-

[21] Respondent also relies on Section 10 (i) of the Act as amended in 1935 (49 Stat. 767–768) which provides that "upon the request of the duly constituted authorities of any State," the Secretary of Agriculture shall cooperate with such authorities in the formulation and administration of joint federal and state programs. This action, which applies to the entire Agricultural Adjustment Act and not merely to the marketing order provisions, obviously does not narrow the powers expressly granted to the Secretary in Section 8c (1). See H. Rep. 1241, 74th Cong., 1st Sess., pp. 22–23.

sons engaged "in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof." Section 8 (2) of the 1933 Act, as amended April 7, 1934, 48 Stat. 528, provided that the Secretary could enter into marketing agreements with persons "engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." These provisions were replaced in the 1935 amendments to the Agricultural Adjustment Act by the language quoted above from Section 8c (1) (49 Stat. 750, 753), which was taken over without change into the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. Thus it is to the 1935 amendments that respondent's contentions on legislative history are addressed.

The first bills introduced in 1935 eliminated the differences between Sections 8 (2) and 8 (3) and authorized the Secretary to issue licenses to persons "engaged in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, in the current of or in competition with or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." [22]

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[22] S. 1807, 74th Cong., 1st Sess.; S. Rep. 548, 74th Cong., 1st Sess., pp. 5–6. The report stated that, "Under the present wording of this section [Section 8 (3) of the 1933 Act]

These bills were still before Congress at the time the *Schechter* case was decided on May 27, 1935. After the *Schechter* decision the bills were redrafted in order to avoid constitutional difficulties presented by the *Schechter* opinion (79 Cong. Rec. 9478). As a result, the present language was adopted, making the Act applicable to handling "in the current of * * * or which directly * * * affects interstate or foreign commerce. The reports of both House and Senate Committees (S. Rep. No. 1011, H. Rep. No. 1241, 74th Cong., 1st Sess.) declared that (R. 207–208)—

> The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce or to the handling thereof which directly burdens, obstructs, or affects inter-

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it has been possible to argue that Congress did not intend to vest the Secretary with power to license handlers who did not operate in the current of interstate commerce, even though their operations could be shown to burden and obstruct interstate commerce. It is, of course, not intended to authorize the licensing of persons handling goods only in intrastate commerce except where such handling burdens, obstructs, or affects interstate commerce. The language contained in the amendments will, however, make it clear that the full extent of the Federal power over interstate commerce is intended to be vested in the Secretary in connection with the issuance of licenses * * *." Substantially identical language was used in explaining the same amendment which was contained in H. R. 5585, H. R. 7713, and H. R. 8052 pending contemporaneously before the House of Representatives. See H. Rep. 808 and H. Rep. 952, 74th Cong., 1st Sess.

> state or foreign commerce in such commodities or products thereof. Section 8 (2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof "in competition with" interstate or foreign commerce. This phrase has been omitted from the proposed section 8c (1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreements, because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.

Respondent insists that the elimination of the phrase "in competition with" shows that Congress did not intend the Act to apply to intrastate transactions competing with interstate, even though such transactions might validly be reached under the commerce clause. But we believe that the reports as a whole show that Congress was still trying to exert all of its constitutional authority under the commerce clause, and that the expression referred to was deleted out of caution in order to make it clear that Congress was not going beyond the formula approved in the *Schechter* case. In the *Schechter* decision the Court had held that the power of Congress over intrastate

activities extended to "direct effects" upon interstate commerce, but no further (295 U. S., at 546, 548). The opinion reviewed prior decisions in such manner as to indicate that all intrastate activities previously regulated, including those which had affected interstate commerce through competition (see p. 25, *supra*), had directly affected interstate commerce. Congress thus could reasonably have assumed that if the effects of intrastate competition upon interstate commerce were "direct" the deleted phrase was unnecessary to subject such competition to the statute; if such effects were indirect, the phrase in question would have been futile.

(b) *The congressional debates.*—Respondent also relies on the congressional debates, excerpts from which have been included in the printed record (R. 214–217), as manifesting an intention that intrastate transactions competing with interstate were not to be regulated. But the portions of the debates which respondent has included in the record are incomplete, and do not give an accurate picture of what was said on the floor.

It is true that Senators Smith[23] of South Carolina and Tydings of Maryland indicated that

[23] Senator Smith was chairman of the Senate Committee on Agriculture and Forestry which reported the bill. His remarks were addressed to the earlier draft of the bill, with respect to which he admitted that he did not like the language used any more than he did the language of the "Transportation Act" (79 Cong. Rec. 8240). The final draft was explained on behalf of the Committee by Senator Murphy (79 Cong. Rec. 11134–11140).

they did not intend intrastate commerce in milk to be regulated [24] (79 Cong. Rec. 8239–8242, 11135–11138). But a number of other Senators, including Senator Murphy, who explained the bill on behalf of the committee (79 Cong. Rec. 11134–11140), indicated doubts that the views of Senator Smith and Senator Tydings could be reconciled with the language in the proposed bill.[25] Senator Shipstead stated (79 Cong. Rec. 11135):

> It seems to me that it must be plain that this language is inserted here to affect the price of milk in intrastate commerce if and when it becomes directly burdensome or obstructs or affects the price of milk in interstate commerce.

Senator Dickinson declared that (*id.*, 11136)—

> The very purpose of the "weasel" words to which the Senator from Idaho has just referred, is to do the very thing the Senator from Maryland has said should not be done.

The intermingling problem was considered in a colloquy between Senators Borah and Murphy (*id.*, 11138):

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[24] Senator La Follette also stated that he understood that intrastate shipments were not being regulated, but it does not appear that he was thinking of the interstate-intrastate competition problem. He also stated that, "The court would have to find the fact as to whether or not it actually flowed in interstate commerce *or tended to obstruct* interstate commerce" (79 Cong. Rec. 11135). [Italics supplied]

[25] Senators Byrd (79 Cong. Rec. 8240), Shipstead (*id.*, 11135), Dickinson (*id.*, 11136), Borah (*id.*, 11138), Murphy (*id.*, 11138, 11139). Senators Murphy and Shipstead were members of the Committee on Agriculture and Forestry.

Mr. BORAH. * * * I think, though, if the Agricultural Department were dealing with an interstate commodity which was so intermingled with intrastate commerce that it could not be separated, and they could not formulate a line of demarcation, that they would be justified in dealing with the intrastate portion of the commodity just as the Supreme Court held in the railroad case that where the interstate business and the intrastate business were so intermingled and the intrastate portion of it was so much a part of the interstate business that the two could not be separated, the Congress would have a right to that extent to control intrastate business.

Mr. MURPHY. At that point, will the Senator apply the principle just voiced to the condition of the Boston milk market, where 25 percent of the production is intrastate and 75 percent, necessary for the use of the people of Boston, is brought in from outside the State, in interstate commerce? Would he not think under such a condition, the intrastate and the interstate commodities being so completely commingled, that on the ground of the intrastate portion burdening interstate commerce, an order would be justified?

Mr. BORAH. The rule, as I understand, is that the Congress has the right fully and completely to regulate interstate commerce, and if, in exercising that right fully and completely to regulate interstate commerce, it becomes necessary by reason of the intermingling of interstate and intrastate com-

merce to affect intrastate commerce, it may do so.

Senator Murphy further stated, on behalf of the committee, that (*id.*, 11139)—

> * * * The position of the committee in respect to these amendments is that intrastate commerce may burden or affect interstate commerce and that consequently this is a constitutional enactment under the decision of the Court in the Shreveport case.

Although no clear picture of "the intention" of the Senate can be drawn from the debate in view of the conflicting positions taken by different Senators, this is not true of the debates in the House.[26] Representative Cooley, one of the members of the House Committee on Agriculture, after referring specifically to the doctrine of the *Shreveport Case*, declared that (79 Cong. Rec. 9485)—

> * * * It seems obvious that in these interstate milk markets the fixing of minimum producer prices for interstate milk could not be effective without fixing equivalent prices for intrastate milk which is in direct competition with interstate milk, and the fixing of minimum producer prices for interstate milk alone would clearly discriminate against such milk.

There was also considerable discussion in the House with respect to the status of intrastate

[26] The House debates are not included in respondent's excerpts from the legislative history.

and interstate milk in Chicago. Representative Halleck of Indiana was particularly interested in the relationship between Indiana and Illinois milk sold in the Chicago marketing area. The explanation of Representative Andresen, of the Committee on Agriculture, was that if a federal marketing area were established, the order provisions would affect all handlers if the law could constitutionally be applied to them; he repeatedly asserted that the question of whether the Act could apply under such circumstances was a constitutional one "to be determined by the court" (79 Cong. Rec. 9479–9480).[27]

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[27] The colloquy on this question reads as follows (79 Cong. Rec., 9479–9480):

"Mr. HALLECK. May I ask the gentleman one further question? Take the case of a milk dealer in the city of Chicago who purchases milk from producers in the State of Illinois. Is it the sentiment of the committee that that man would be subject to the orders as provided for in these amendments?

"Mr. ANDRESEN. If a marketing area were set up in Cook County or in Chicago, then the order provisions would affect all handlers within that marketing area. There, again, we come to the question of the constitutionality of this provision, or whether or not the milk that is sold by a farmer in Illinois to the handler within a marketing area in Chicago is in interstate commerce or not.

"Mr. HALLECK. Was it not the sentiment of the committee that that would be a purely intrastate transaction in the light of the Schechter decision, which would take the transaction without the realm of Federal regulation?

"Mr. ANDRESEN. If there were no marketing area set up, of course, it would be purely an intrastate transaction, but if the Federal Government goes in and sets up a marketing area and issues orders for the handlers in that area, of course,

This discussion shows that although there may have been doubt as to what the courts would hold, the House intended that if it were constitutional to do so the bill should apply to intrastate handlers competing with interstate. This supports

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it would be a legal question as to whether or not the man who dealt in Illinois would come within the provision.

"Mr. HALLECK. Assuming that the milk dealer in Chicago who bought his milk from producers in the State of Illinois would not be subject to the orders, on the theory that he was engaged in a transaction which was wholly intrastate, and then assume the case of another milk dealer in the city of Chicago who was buying his milk in my State of Indiana, he would, of course, be subject to these orders, and what would be the effect as between the two, if the dealer buying his milk from producers in Indiana had to pay a stipulated price, which was fixed in the order, while the other dealer buying his milk in the State of Illinois would buy it at a lesser price?

"Mr. ANDRESEN. If there were no State law regulating the price of milk, similar to ones they have in the State of New York and in some other States—I do not know whether there is one in Illinois or not—then, of course, it would become a constitutional or legal question to determine whether or not the dealer living in Chicago or in Illinois would have to pay the same price to his Illinois farmer as he did to the farmer living over in Indiana, and I think this is a question that will have to be determined by the court.

* * * * * *

"Mr. MOTT. * * * My question is this. If I am a milk handler in Chicago and you produce your milk some place in the State of Illinois, as the situation has been stated here, and our transactions in milk as producer and dealer are entirely within the State of Illinois, do we come under the provisions of this bill?

"Mr. ANDRESEN. If there is no marketing area or marketing territory set up, you do not. If there is and the law is constitutional, you do. Now, that is a question for the courts."

the interpretation which we have suggested for the quoted passage from the committee reports—that Congress was not clear as to what the courts would hold to be a direct effect upon interstate commerce, but that the complete exercise of the federal commerce power was intended.

In the light of the explanation in the House, the disagreement in the Senate, and the language of the committee reports, we submit that the legislative history of the Act is more consistent with a literal reading of the terms used than with the forced interpretation advocated by respondent. At most, the legislative history is ambiguous. Such ambiguity is obviously insufficient to warrant a construction of the statute contrary to its plain terms. When statutory language is clear and legislative history ambiguous, the latter does not prevail.

II

THE DISTRICT COURT HAD NO JURISDICTION TO ISSUE AN INJUNCTION AGAINST THE UNITED STATES

Respondent, by way of counterclaim, sought and obtained an injunction forbidding the enforcement of the statute against it by the United States, its officers and agents (R. 99–101, 247–248). In view of the court's refusal to enforce the marketing order against respondent, the issuance of the injunction is of little practical significance. Nevertheless, the granting of an injunction against the Government constituted such fundamental error

that we feel it necessary to bring the point to the Court's attention.

Injunctions cannot, of course, be granted against the United States without its consent, and no statute permits the issuance of an injunction in the circumstances of this case. The fact that the United States originally instituted this action does not mean that Congress has consented to the granting of affirmative relief against the United States by way of counterclaim. "Generally speaking, a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim." *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *The Thekla*, 266 U. S. 328. "The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it." *United States* v. *Shaw, supra; Nassau Smelting Works* v. *United States*, 266 U. S. 101.[28]

Part Two

Wrightwood Dairy Company, the respondent in No. 744, is the cross-petitioner in No. 783. In this part of our brief we shall endeavor to antici-

[28] Rule 13 (d) of the Federal Rules of Civil Procedure provides that:

"These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States, or an officer or agency thereof."

pate the arguments which will be advanced in support of the questions presented by the cross-petition. To avoid confusion we shall continue to refer to the company as the respondent.

The issues presented by the cross-petition arise in part from the rejection by the trial court of certain arguments advanced by respondent in opposition to the Government's main case, and in part from the ruling of the trial court striking certain of the separate defenses set up in the answer to the complaint (R. 244). All of the issues relate to the validity of the order or the statute, and presumably could have been raised without a cross-appeal. Since they present either pure questions of law with respect to which evidence need not be considered, or questions of fact to be determined on the basis of the evidence of record, including the transcript of the proceedings before the Secretary,[19] they may be decided upon the record before this Court. Consequently, we shall deal with the issues on their merits without reference to the manner in which they were raised.

I

THE ORDER WAS ISSUED IN FULL COMPLIANCE WITH THE APPLICABLE STATUTORY PROVISIONS

In this case the Secretary's findings and order were promulgated in the same manner and are

[19] The volumes of the record before the Secretary were introduced by respondent as original exhibits. Oral testimony was also taken (R. 218–231), but it does not appear to bear upon any of the issues presented here.

based on the same type of evidence as the findings and orders approved by this Court in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U. S. 588. Before discussing the various objections raised by respondent, we shall outline briefly the procedural steps leading up to the issuance of the order.

Pursuant to the provisions of Sec. 8c (3) of the Act, the Secretary, on June 9, 1939, gave notice of a hearing on a proposed marketing agreement and order to be held in Chicago, Illinois, beginning June 26, 1939.[30] The hearing was held in accordance with the notice.[31] Six hundred ninety-three pages of testimony were taken and many exhibits were offered in evidence.

On August 18, 1939, the Secretary submitted to the industry a tentatively approved marketing agreement for signature of handlers (R. 63); and on August 19, 1939, he submitted to all producers known to be qualified to participate in a refer-

[30] The notice was published in the Federal Register (4 Fed. Reg. 2366) and given wide publicity (see Def. Ex. 1 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 1); copies with pertinent data attached, were sent by mail to respondent (see p. 6 of list attached to affidavit of Ray Harris forming part of Ex. 1, Transcript of Record before the Secretary of Agriculture, Def. Ex. 1 (Original)) and other milk distributors, producers' associations, and persons who might be interested.

[31] See Def. Ex. 3 (Original).

endum a ballot upon which to indicate whether they approved or disapproved of the issuance by the Secretary of an order ~~regulating~~ the handling of milk in the Chicago, Illinois, marketing area, in the same manner as provided in the tentatively approved marketing agreement (R. 78–80).

The vote in the referendum was overwhelmingly in favor of the order.[32] Consequently, on August 24, 1939, the Secretary made the determinations required under Section 8c (9) of the Act. These determinations were approved by the President on August 26, 1939.[33]

On August 28, 1939, the Secretary, pursuant to Section 8c of the Act, issued a proclamation in which he found that satisfactory statistics were not available for the base period August 1909 to July 1914, but that such statistics were available for the period August 1919 to July 1929. He therefore proclaimed the latter period to be the applicable base period to be used in determining parity prices.[34]

The order was issued on August 28, 1939, to be effective September 1, 1939.[35]

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[32] Petitioner's more definite statement (R. 61–83) offered in evidence by respondent (R. 201) shows that 15,695 producers were requested to vote, 11,278 approved the issuance of the order, 699 disapproved, and the ballots of 269 were disqualified.

[33] 4 Fed. Reg. 3770.

[34] 4 Fed. Reg. 3770.

[35] 4 Fed. Reg. 3764.

A. THE ORDER IS BASED UPON A HEARING INITIATED AND CONDUCTED IN ACCORDANCE WITH LAW

Respondent contends that the entire order and all the findings are invalid because the Secretary did not hold a hearing upon the order as issued (cross-petition, pp. 8–10).

The hearing was held upon a proposed marketing agreement and order. The order finally approved after the hearing differed from the proposed agreement in certain respects (see p. 45, *infra*).

In support of its contention respondent apparently takes the position that Sections 8c (3), 8c (9), and 8c (10) of the Act are to be construed as permitting only the issuance of an order which is precisely identical to a marketing agreement proposed in advance of the prescribed hearing. The necessary implication of the argument is that after a hearing the Secretary is limited to approving or disapproving the proposal and cannot use the evidence received to make such revisions as he finds necessary before submitting a proposed marketing agreement or promulgating an order.

Respondent apparently relies on the provision in Section 8c (10) that—

> No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the same respective classes of industrial or commercial activity

specified in, a marketing agreement upon which a hearing has been held.

Obviously the foregoing provision does not require precise identity between the proposal and the order; it only requires that the order regulate in the same manner the same classes of people. A comparison of the proposal on which the hearing was held with the order as issued (R. 8–22) shows that the three documents vary only in matters of detail.[36] The general scheme or "the manner" of regulation is the same in each; each provides minimum classified prices which handlers are required to pay for milk purchased from producers, and each provides for distributing the returns from the classified prices to all producers through a market-wide equalization pool. Furthermore, the proposal, the marketing agreement, and the order are all applicable to persons engaged in precisely the same class of industrial or commercial activity, *i. e.*, the handling of milk.

The principal difference between the proposed marketing agreement and the order as issued to which respondent has called attention is that the marketing area in the original proposal was larger than the marketing area designated in the final order. However, that means no more than that the order regulates fewer persons engaged in the

[36] The proposal appears in Def. Ex. 1 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 1. A comparison of that proposal with the order as issued is set forth in detail in Appendix B, *infra*.

particular class of industrial or commercial activity than was originally proposed. The statute, in requiring that the order be applicable *only* to persons engaged in the same classes of activity as specified in the proposal, fixes the maximum applicability of the order but does not prescribe the minimum number of persons who shall be regulated.

The obvious reason for referring to "a marketing agreement upon which a hearing has been held," was to insure that there had been a public hearing upon the general scheme of regulation finally put into effect, and that no class of persons should be subjected to regulation except those put on notice by the proposal. Certainly, it was not intended that the Secretary should be prohibited from making such changes within the general framework of the original scheme as should appear necessary from the evidence taken at the hearing. So to construe the statute would be to reach an absurd result. The Secretary would never be able to issue an order until he had held a hearing on a proposal which conformed in the most minute detail to the final order. This might involve the holding of innumerable hearings with the inevitable result that the last hearing would be purely *pro forma*. It is inconceivable that Congress "intended to force the Secretary to go through a meaningless ritual." *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 596.

B. THE SECRETARY PROPERLY DETERMINED THE APPLICABLE BASE PERIOD

Section 2 of the Act establishes the pre-war period August 1909 to July 1914 as the base period for which the purchasing power of milk must be determined in fixing parity prices in orders regulating the handling of that commodity. It is provided in Section 8e that if, in connection with the making of any marketing agreement or the issuance of any order, the Secretary finds and proclaims that the purchasing power during the base period specified in Section 2 cannot satisfactorily be determined from available statistics in the Department of Agriculture, then the base period shall be August 1919 to July 1929, or any part thereof, for which the Secretary finds that satisfactory statistics are available. In connection with the present order, the Secretary adopted August 1919 to July 1929 as the base period.

1. Respondent asserts that the Secretary's determination is invalid because he failed to find in the order that the purchasing power of milk could not be satisfactorily determined for the period August 1909 to July 1914 from available statistics in the Department of Agriculture. Respondent makes no mention of the fact that on the same day, August 28, 1939, the Secretary issued a proclamation, published in the Federal Register, in which he set forth all of the findings required by Section 8e of the Act and adopted August 1919

to July 1929 as the base period to be used in connection with this order."[37] If respondent was aware of the existence of this finding, we must assume that its objection is based upon the fact that the Secretary made the finding in a separate document instead of including it in his order. But nothing in Section 8e indicates that the finding must be included in the order, and, in fact, the section gives every indication that a separate proclamation was intended.[38] Neither does Sec-

[37] The proclamation reads as follows (4 Fed. Reg., 3770):

"Pursuant to the powers conferred upon the Secretary of Agriculture by the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture hereby finds and proclaims that, in connection with the execution of a marketing agreement and the issuance of an order regulating the handling of milk in the Chicago, Illinois, marketing area, the purchasing power of such milk during the base period August 1909–July 1914 cannot be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk can be satisfactorily determined from available statistics in the Department of Agriculture for the period August 1919–July 1929; and the period August 1919–July 1929 is hereby found and proclaimed to be the base period to be used in connection with ascertaining the purchasing power of milk handled in the Chicago, Illinois, marketing area, for the purpose of the execution of a marketing agreement and the issuance of an order regulating the handling of milk in that area."

[38] Section 8e reads as follows:

"SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in sec-

tion 8c (4) require this finding to be set forth in the order; that section refers only to the findings required by Section 8c of the Act, and not to Section 8e.

It has been the consistent administrative practice to issue separate proclamations as to the base period in connection with marketing agreements and orders, and no court has disapproved the practice. Cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588. The opinion in the *Hood* case reveals that a similar proclamation with respect to the base period was issued separate from and at least 11 days before the issuance of the order. 307 U. S., at 592. Furthermore, the decision in the *Hood* case definitely rejects an argument substantially indistinguishable from respondent's here. There the Secretary, in *amending* an order, used the post-war base period authorized under Section 8e. No new proclamation was issued pursuant to Section 8e, although Section 8c (17) specifically provides that all of the provisions of Sections 8c, 8d, and 8e applicable to orders shall be applicable to amendments. This

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tion 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture."

Court held that the Secretary's proclamation issued in connection with the promulgation of the original order satisfied the requirements of Section 8e in connection with the issuance of the amendment. 307 U. S., at pp. 595–596.

2. Respondent also insists that there was no evidence before the Secretary to support the finding that statistics were not available for the pre-war base period. We submit that the determination which the Secretary is required to make under Section 8e of the Act is not one which should be subjected to judicial review. The Secretary's finding serves the sole purpose of selecting one of two available standards to guide administrative judgment. The proclamation informs all concerned, including whatever courts may subsequently be required to review the order, as to which standard the Secretary has adopted. The fact which is determined is as to the availability of satisfactory statistics in the Department of Agriculture. In making that determination, the Secretary necessarily exercises administrative discretion. He must determine, *first*, what statistics are available in his Department and, *second*, which of the available statistics are satisfactory. The authority thus vested in the Secretary is not unlike authority given to the Director of the Mint to estimate, and to the Secretary of the Treasury to proclaim, the value of foreign coins; or authority given to the Secretary of the Interior to make determinations as to public lands; or authority

given to the Secretary of the Interior to determine the tribal membership status of Indians; or authority given to the Comptroller of the Currency to determine the necessity for stock assessments in the case of insolvent banks. In all of these instances, the courts have held that such determinations are exercises of administrative discretion which are final and cannot be reviewed by the courts. *Hadden* v. *Merritt,* 115 U. S. 25; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *West* v. *Hitchcock,* 205 U. S. 80; *Adams* v. *Nagle,* 303 U. S. 532. It follows that the Secretary's determinations under Section 8e are exercises of administrative discretion not reviewable by the courts.

Nevertheless, if it should be held that the Secretary's determination is reviewable, it is apparent from the evidence that his findings are amply supported. Respondent has pointed to certain statistics in the record of the administrative hearing which relate to milk prices in Chicago during the pre-war period. No reference is made to the fact that these prices are not on a classified-use basis and hence are not comparable to the prices which the Secretary put into effect pursuant to Section 8c (5) A of the Act. In fact the record affirmatively shows that the classified-use plan of pricing milk did not come into operation in the Chicago market until after 1918.[39] It

[39] See Def. Ex. 4 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 2, p. 18, and Def. Ex. 3 (Original), p. 165.

is apparent that statistics relating to milk prices prior to the introduction of the classified-use plan in 1918 are not satisfactory statistics for computing the purchasing power of milk which is to be sold on a classified-use basis.

C. THE SECRETARY PROPERLY DETERMINED THAT THE ORDER HAD RECEIVED THE REQUISITE PRODUCER APPROVAL

Respondent contends that the Secretary failed to comply with Section 8c (9) of the Act,[40] first, because he failed to find that the order was approved by at least two-thirds of the producers who, during a representative period, were engaged in the production of milk for sale in the marketing area and, second, because the Secretary, in endeavoring to determine the question of approval, failed to comply with Section 8c (19) which provides for the conduct of a referendum among producers. The attack upon the sufficiency of the Secretary's finding is based upon the phraseology

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[40] Section 8c (9) provides that orders "shall become effective in the event that * * * the Secretary of Agriculture, with the approval of the President, determines" (1) that the refusal or failure of handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act; (2) that the issuance of the order is the only practical means of advancing the interests of producers pursuant to the declared policy of the Act; and (3) that the issuance of the order is approved or favored either (a) by two-thirds of the producers who, during a representative period, were engaged in the production of the commodity for sale in the marketing area, or (b) by producers who, during a representative period, produce two-thirds of the volume of such commodity in the marketing area.

of the finding. The attack upon the referendum is based upon the Secretary's determination as to who should be allowed to participate in it.

The Secretary found and set forth in the order that over 67% of the producers voting in a referendum had approved or favored the order (R. 9).[41] Respondent insists that the finding does not satisfy the requirements of Section 8c(9)(B)(i) because the Secretary did not state that the order was favored by at least two-thirds of the producers who, during a representative period, had been engaged in the production for market of the commodity involved. While it is true that the Secretary's finding is not in the exact language of the statute, nevertheless the finding states the sole fact necessary to prove the requisite producer approval. The requirement in Section 8c(9) that two-thirds of the producers be found to favor the order is satisfied by a finding that two-thirds of those voting in a referendum have approved it. Cf. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 559–561, dealing with an almost identical problem under the Railway Labor Act. See also *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. (2d) 144 (C. C. A. 7th), certiorari denied, 311 U. S. 704. If this were not otherwise clear, Section 8c (19) demonstrates that that was what Congress intended. The latter section provides that—

[41] A similar finding is contained in a separate determination made by the Secretary with the approval of the President. 4 Fed. Reg. 3770.

> For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provisions. * * *

We submit that in the light of this provision a finding that two-thirds of the voters in a referendum have approved the order satisfies the statute.[42] It is not essential that the Secretary's findings be in the exact words of the law as long as they adequately disclose the existence of the statutory requisites.

The Secretary's finding cannot be challenged on the basis of the results of the referendum. The total number of producers who, during April 1939, were engaged in the production of milk for sale in the Chicago market and who were notified to vote in the referendum, was 15,695. Of those pro-

[42] Section 8c (19) refers to the total number of producers *represented* in the referendum. The obvious reason for using the word "represented" instead of "participating" is that a cooperative association may, pursuant to the provisions of Section 8c (12) of the Act, cast the votes of all of its members.

ducers 11,278—well over two-thirds—voted in favor of the order and only 699 voted against it."[13]

Respondent contends, however, that the Secretary did not invite all qualified producers to participate in the referendum. This argument is based on the fact that the Secretary did not regard as qualified those who produced milk solely for manufacture into cheese, butter, evaporated milk, and similar products which were subsequently sold to consumers in the Chicago marketing area.

It is true that the Secretary limited participation in the referendum to producers who were delivering fluid milk to handlers engaged in the distribution and sale of fluid milk in the marketing area; but those are the only producers whose milk is subject to the order. The order provides a method of payment to "producers," and a producer is defined as "any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such plant" (R. 11). The order also defines handlers who are subject to regulation thereunder as any person who purchases or receives milk from producers or other handlers

[13] These facts are set forth in plaintiff's more definite statement (R. 61) which was not controverted by the defendant but was in fact offered in evidence by the defendant in the final hearing (R. 201).

and disposes of a part thereof as milk or cream in the marketing area (R. 11). Thus, it is apparent that this is an order fixing prices for milk which is qualified and available for sale in the marketing area as fluid milk. Only those producers who are engaged in the production of such milk are affected by the order. Consequently, they were the only ones entitled to participate in the referendum.

Practically the same argument as that advanced by respondent was urged in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 597–599. There the contention was made that a large number of southern and western producers who delivered milk to stations shipping cream to the Boston market should have been permitted to vote. This Court pointed out that such producers were not engaged in the production of milk for shipment into the marketing area in fluid form, and held that the Secretary had properly excluded them from the referendum. *A fortiori* the exclusion in this case of producers engaged in producing milk only for manufacture into cheese, butter, etc., was entirely proper.

D. THE SECRETARY DEFINED THE MARKETING AREA IN THE ORDER IN ACCORDANCE WITH THE TERMS OF THE STATUTE

The marketing area to which this order is applicable is defined as consisting of the cities, towns, and villages of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe (R. 11). Respondent asserts that the Secretary arbitrarily

omitted from the marketing area neighboring cities and towns in the same vicinity, such as Oak Park, Berwyn, Cicero, and others. Although it is charged that the Secretary's definition was unlawful, discriminatory, unreasonable, void, and contrary to the Act, the sole basis for this argument appears to be that handlers are required to pay producers more for milk sold within the marketing area than other handlers are required to pay for milk which they sell outside of the marketing area.

The fallacy of respondent's argument is apparent from the face of the order. The order provides that every handler who sells milk within the marketing area must account for that milk at the prices fixed in the order (R. 14–15). However, handlers subject to the order who sell part of their milk outside the marketing area are only required to pay for that milk at the price which the Market Administrator determines to be the prevailing price in the market in which the milk is sold (R. 16). Obviously there is no discrimination as between handlers who are subject to the order and handlers who are not subject to the order insofar as sales outside the marketing area are concerned.

In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, an argument very similar to that advanced by respondent was rejected. There it was contended that the failure to include portions of New Jersey in the New York marketing

area placed handlers selling only in the New York area at a disadvantage. The argument was that handlers selling both within the New York area and outside the New York area could use the profits obtained from the sale of milk in unregulated areas to cut prices within the regulated marketing area. This Court held that such a showing would not amount to illegal discrimination. There is even less basis for claiming discrimination in the instant case.

Insofar as respondent claims that the marketing area was not prescribed in accordance with the terms of the Act, we fail to find any justification for that argument in the statute. The only limitations prescribed in regard to fixing the size of marketing areas are contained in Section 8c (11) of the Act. Nothing contained in that section supports respondent's argument.

If respondent intends to urge that the Secretary's action in some way violates constitutional rights it is equally apparent that the argument is without merit. In all cases in which a statute leaves to an administrative body the duty of determining the exact limits of regulation there is a wide zone of discretion. A boundary must always be drawn at some point, and the differentiation between similar situations close to but on opposite sides of the borderline will inevitably seem arbitrary. But in the absence of a plain abuse of discretion, courts will not interfere. See *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495.

The record before the Secretary indicates the reasonableness of the particular geographical limits adopted. It shows that the towns included in the order were the only ones having health standards comparable to those in force in Chicago.[44] It is obviously practicable and reasonable that those communities should be included in the marketing area which have comparable requirements as to the quality and conditions of production of milk sold for consumption in fluid form.

II

THE ACT CONTAINS NO INVALID DELEGATION OF LEGISLATIVE POWER

Respondent contends that the Act contains invalid delegations of legislative authority in the provisions authorizing the Secretary to make adjustments in prices previously established (Section 8c (18)) and to issue regulations (Section 10 (c)).

Respondent does not point to any particular action taken under either of these sections, and it does not appear that any orders or regulations issued under them have been in any way prejudi-

[44] The testimony establishes the necessity for including in the marketing area only towns having similar health standards for milk (Def. Ex. 3 (Original), pp. 462–463, 512–514). It also appears that Evanston, Kenilworth, Wilmette, Winnetka, and Glencoe, Illinois, were the only neighboring towns having health standards comparable to Chicago at that time (see supplemental brief of Pure Milk Association, pp. 1–2a, contained in Def. Ex. 2 (Original); Def. Ex. 3 (Original), pp. 103–105).

cial to respondent. Accordingly, respondent has no standing to question their constitutionality. *Heald* v. *District of Columbia,* 259 U. S. 114, 123, and cases cited; *Virginian Railway Co.* v. *System Federation,* 300 U. S. 515, 558; *Premier-Pabst Co.* v. *Grosscup,* 298 U. S. 226, 227; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583.

In any event, the contentions are frivolous. It is clear from Section 8c (18) as a whole [45] that the

[45] Section 8c (18) reads as follows:

"The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a suf-

Secretary is to follow the same standards in adjusting prices when "necessary on account of changed circumstances" as in fixing prices originally. These standards are set forth at length in the three preceding sentences, the validity of which was upheld in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 576–577. The authority "to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title" (Section 10 (c)) is also clearly valid. *United States* v. *Grimaud*, 220 U. S. 506. In the *Grimaud* case, as here, penalties were imposed for violation of the administrative regulation.

III

THE ACT IS NOT VOID BECAUSE IN CONFLICT WITH FEDERAL AND STATE ANTITRUST LAWS

Respondent also asserts that the Act is invalid because it conflicts with the federal and Illinois antitrust laws. There is plainly no conflict between these statutes and the Agricultural Marketing Agreement Act. And if there were, the later federal law would prevail over the earlier, and also over any conflicting state enactment.

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ficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices."

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IV

THE CASE IS NOT MOOT

Respondent contends that the case is moot because the original Order No. 41 (R. 8), effective September 1, 1939, was "repealed" by "Order No. 41, as amended" (R. 120), effective July 1, 1940, after the complaint in this case was filed.[48]

The amended order differs from the original in many details, but not at all in its basic scheme. The original order was thus not repealed, in any realistic sense, but incorporated in the order as amended for the purpose of "preserving a harmonious text" *Posadas* v. *National City Bank*, 296 U. S. 497, 503–506, and cases cited; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 11.

Even if the original order is regarded as having expired the case is not moot. It is undisputed that respondent has failed to make the payments to the market administrator required under the original order (R. 158, 246) and demanded in the complaint (R. 5–7). The obligation to make such payments would have survived the termination of the order. For the order (R. 21) provided in Section 941.12 (c) that—

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[48] The complaint was filed December 26, 1939 (R. 2).

> * * * If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination * * *.

Respondent apparently contends that, since the amended order took the place of the original, the above provision was abrogated and accordingly ineffective to preserve accrued rights. This does not follow, inasmuch as it cannot be assumed that any termination of the order was intended to nullify this particular provision. But in any event, the amended order contains an identical clause (R. 140), and thus plainly manifests an intention that, to that extent at least, the original order be continued and not repealed. *Posadas* v. *National City Bank, Bear Lake Irrigation Co.* v. *Garland,* both *supra.* It is absurd to suggest that the replacement of one order preserving existing obligations by a similar order containing the same provisions has the effect of cancelling the obligations which have accrued under the original order.

In the *Rock Royal* case the Court held that, in view of a similar provision preserving accrued rights, the complete suspension of the New York

milk order did not render the case moot (307 U. S., at 555–556). Here there has not even been a suspension, but only a continuation of the obligation in altered form.

Closely in point also are *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413–414, *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516, and *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257. In the *Panama* case the amendment of regulations issued by the Secretary of the Interior was held not to render the case moot. In the *Southern Pacific* case the Court refused to hold moot a case involving an order of the Interstate Commerce Commission which had previously expired, inasmuch as (219 U. S., at 515)—

> * * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, * * *.

In the *Goodyear* case the Court held that an amendment to the statute did not render moot a controversy arising out of Goodyear's failure to comply with the law before the amendment.

CONCLUSION

It is submitted that the decision of the court below should be reversed and that Order No. 41 should be sustained on the merits.

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JANUARY 1942.

UNITED STATES DEPARTMENT OF AGRICULTURE
DIVISION OF MARKETING AND MARKETING AGREEMENTS

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

(Including Amendments of the 76th Congress, 1st Session)

UNITED STATES
GOVERNMENT PRINTING OFFICE
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PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session, 7 U. S. C. A. 674, 50 Stat. 249), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes. References to recent amendments to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes.

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED[1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy):

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such

[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

orderly marketing conditions for agricultural commodities in interstate commerce as will establish[3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to deter-

[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish".

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

mine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the terminations of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores *and the products of honeybees*),[5] or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Ore-*

[5] The words "and the products of honeybees" were inserted by public, No. 246, 75th Congress, Chapter 587, 1st session, approved August 5, 1937.

gon, and Idaho,[6] and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops,[7] honeybees,[8] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the

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[6] The words ", other than apples produced in the States of Washington, Oregon, and Idaho," were added by Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.

[7] The word ", hops," was inserted by and the following provision was contained in Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938:

"SEC. 3. No order issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops except during the two crop years next succeeding the date of enactment of this Act."

The provision quoted was amended by Public, No. 91, 76th Congress, Chapter 150, 1st session, approved May 26, 1939, to read as follows:

"SEC. 3. No orders issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops after September 1, 1942."

[8] The word "honeybees," was inserted by Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.

case of orders covering milk products only, such provision is approved or favored by at least three-fourth of the producers who, during a representative period determined by the Secretry of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[1] *of* milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making

[1] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Oregon, and Idaho*,[10] and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, *hops*,[11] *honeybees*,[12] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [13] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [14] such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets

[10] Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.
[11] Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938.
[12] Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.
[13] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.
[14] The italicized words were substituted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agirculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating

to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional pro-

duction areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have,

during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[15]

[15] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[16]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a num-

[16] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement act of 1937.

ber of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[17] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority

[17] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[18] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[19]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any

[18] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[19] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes*

Territory, the District of Columbia, possession of the United States, and foreign nations.[20]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[21] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000; Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and book of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22 (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend

[20] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[21] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[22]

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows: [23]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[22] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title," wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment" whenever they appeared, and inserting in lieu thereof the word "any."

[23] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in the footnotes.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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APPENDIX B

A COMPARISON OF THE PROPOSED CHICAGO MILK MARKETING AGREEMENT AND ORDER NO. 41 AS ISSUED

A comparison of the milk marketing agreement and order submitted for consideration at the public hearing [Def. Ex. 1 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 1], and Order No. 41 as issued (R. 8–22) shows that the two documents are identical in general framework, underlying scheme of regulation and classes of persons affected. The differences occur in matters of detail which should properly be determined on the basis of the evidence adduced at the public hearing.

Each of the two documents contains ten sections having identical headings and dealing with identical features of the plan of regulation. Order No. 41 contains in addition three formal sections appearing in all orders, namely, a section containing the Secretary's findings, a section dealing with the effective time and suspension or termination of the order, and a section fixing the liability of handlers as several and not joint; and also a section setting up a market advisory committee with no powers whatever but simply constituting a contact group between the market administrator and the industry.

435553—42

Section 1

Section 1 in each document contains nine definitions, six of which are identical as between the two documents. As to the remaining three:

The *marketing area,* as defined in Order No. 41, contains no territory not included in the marketing area as defined in the proposal, but does not include all of the territory included in the proposal.

The definition of *producer* is the same except that the phrase "new producer" is eliminated by Order No. 41 as being obviously superfluous, and the general phraseology is clarified.

In defining a *handler* the phraseology appearing in the proposal is clarified by Order No. 41 and the definition is made to include the handling of cream as well as fluid milk in the marketing area.

Section 2

Section 2, establishing the office of the market administrator, is identical in both documents.

Section 3

Section 3, dealing with reports, is identical in both documents except for the phrase "and new producer" which is eliminated from the proposal in two places as being obviously superfluous.

Section 4

Section 4, dealing with the classification of milk, is identical in both documents as to the provisions concerning Class III milk and interhandler and nonhandler sales.

The provisions concerning Class I milk and Class II milk are the same except that flavored milk and flavored milk drinks, placed in Class I by the proposal, are taken out of Class I and put in Class II, and milk used for cottage cheese, which is not dealt with specifically in the proposal, is placed in Class II by the order.

Section 5

Section 5, dealing with minimum prices, is *the same* in the following respects:

(1) All prices are based on milk of 3.5% butterfat.

(2) The formula for pricing Class I milk is a premium over the prevailing condensery price for milk computed according to the formula set forth in the evaporated milk marketing agreement of May 31, 1935.

(3) The basic prices are for milk f. o. b. a plant located not more than 70 miles from the City Hall in Chicago.

The two documents *differ* as to this section in the following respects:

(1) Class I.

The proposal fixed a premium of 80¢, with a minimum of $1.80 and a maximum of $2.20 per hundredweight. The order fixed a premium of 70¢ for milk delivered from July 1 to November 30, 55¢ for milk delivered from December 1 to April 30, and 45¢ for milk delivered from May 1 to June 30, and fixed a special price of $1.395 for Class I milk disposed of in relief channels.

(2) Class II.

The proposal fixed the price on a formula based on the wholesale price for bottling cream in Chicago. The order adopted the same formula used for Class I with the following scale of premiums: 32¢, 28¢, and 25¢.

(3) Class III.

The proposal fixed the price at 3½ times the current price for 92 score butter at Chicago, plus 10%. The order raised the 10% to 20%, and provided that, if the milk were used for making evaporated milk, the price should be the price computed according to the formula set forth in the marketing agreement for evaporated milk.

(4) Out-of-market sales.

The provision pricing out-of-market sales is identical in both documents, with the exception that the order adds provisions allowing to the handler freight differentials for milk delivered beyond the 70-mile zone.

ADDED: An additional subsection was placed in Order No. 41 allowing a handler freight differentials for milk delivered beyond the 70-mile zone.

Section 6

Producer-distributors

The two documents are *alike* in treatment of the case of a producer-distributor who buys no milk from producers or an association of producers.

In dealing with the producer-distributor who buys milk from producers or an association of producers, both documents provide that milk in each class purchased from other handlers is excluded from the pool computation.

Otherwise, the following minor *differences* occur:

(a) The order provides that in the pool computation 95%, instead of 90% as proposed, of the distributor's own production is excluded from his Class I and Class II sales, and 5%, instead of 10%, of such milk is excluded from his Class III sales.

ADDED: Another provision is added by the order fixing the price of bulk milk or cream sold by the producer-distributor to another handler at the Class III price unless otherwise used.

Section 7

Uniform price to producers

In substance the two documents are identical in fixing the value of milk to each handler at the applicable class prices and in providing a uniform price to producers computed by dividing the total value of the milk reported by all handlers in the market by the total quantity of such milk. Only minor differences in phraseology and subordinate elements appear.

Section 8

Payments for milk

The provisions dealing with payments for milk are identical in substance. Each document requires payment of the uniform price, subject to butterfat and location differentials, to each producer; and establishes a market-wide equalization pool and a producer settlement fund, maintained by the market administrator, into which, or from

which, a handler pays or draws, as the case may be, if the total value of the milk used by him is greater, or less, than his total payments to producers at the uniform price. Only minor differences in phraseology and subordinate elements appear.

Section 9

Expense of administration

Subsection (a) is the same in both documents except that the order requires payment on the 15th day after the end of each delivery period instead of the 25th day as proposed. Such changes as appear in the phraseology are obviously for clarification.

Subsection (b) is identical in both documents.

Section 10

Marketing services

Subsection (a) is the same in substance in both documents, except that the order requires payment on the 15th day after the end of the delivery period instead of the 25th day. Minor changes in phraseology are obviously for clarification.

Subsection (b) is the same except that the order requires payment on the 15th day after the end of the delivery period instead of the 25th day as proposed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 744

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALVIN E. STEIN,
Attorney for Respondent.

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INDEX.

	PAGE
QUESTION PRESENTED	1
STATUTES AND ORDER INVOLVED	2
STATEMENT	5
ARGUMENT AGAINST GRANTING THE WRIT	7
I. The decision of the Court below followed the settled law as to which there is no conflict	7
1. Congress did not intend in passing the Agricultural Marketing Agreement Act of 1937 and prior Acts to assume control of purely intrastate transactions, and the Act itself contains no such provision	8
(a) The Agricultural Adjustment Act of 1933 did not apply to transactions where the products were produced and sold within the same State	8
(b) Congress in 1935, in amending the Act of 1933 did not intend that the provisions shall apply to transactions where the products were sold and produced within the same State	9
(c) The provisions of the Agricultural Adjustment Act of 1935 do not apply to transactions where the products were produced and sold in the same State	11
(d) The Agricultural Marketing Agreement Act of 1937 re-enacted all the provisions of the Agricultural Adjustment Act of 1933 and 1935, and its provisions do not apply to transactions where the product is produced and sold within the same State	14
II. The case presented by the petitioner and the question involved does not necessitate review and decision by this Court	15
CONCLUSION	25

Table of Citations

PAGE

Cases:

Allen v. Wallace, 12 F. Supp. 515 9

Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401 18

Berdie v. Kurtz, 75 F. (2nd) (C. C. A. 1935) 898 9

Carter v. Carter Coal Co., 298 U. S. 238 ..... 14, 24

Chicago Board of Trade v. Olsen, 262 U. S. 1 20

Currin v. Wallace, 306 U. S. 1 21

Douglas v. Wallace, 8 F. Supp. 379 ..... 9, 18

Duplex Printing Press Co. v. Deering, 254 U. S. 443 11

Edgewater Dairy Co., Inc. v. Wallace, 7 F. Supp. 121 9

Federal Trade Commission v. Bunte Bros., 312 U. S. 349 23

Federal Trade Commission v. Raladam Co., 283 U. S. 643 15

Hegeman Farms v. Baldwin, 293 U. S. 163 14

Heisler v. Thomas Colliery Co., 260 U. S. 245 14

Holbrook v. Wallace, Civil Act No. 5811 (D. D. C.) 19

Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346 ..... 14, 18

Mulford v. Smith, 307 U. S. 38 21

National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1 ..... 20, 24

Nebbia v. New York, 291 U. S. 502 ..... 13, 18

Railroad Commission of Wisconsin v. C. B. & Q. R. Co., 257 U. S. 563 20

Royal Farms Dairy, Inc. v. Wallace, 8 Fed. Supp. 975 9

Schechter v. United States, 295 U. S. 495 ..... 8, 9, 14, 20, 21, 22

PAGE

TABLE OF CITATIONS (continued).

Cases (continued):

Shreveport Case, 234 U. S. 342 20
Stafford v. Wallace, 258 U. S. 495 21
Stewart v. Kahn, 78 U. S. 493 12
United States v. Adler's Creamery, Inc., 110 F. (2nd) 483, (certiorari denied, 311 U. S. 657) 17
United States v. Andrews, 26 F. Supp. 123 18
United States v. Board of Commissioners, 26 F. Supp. 270 12
United States v. Butler, 297 U. S. 1 8
United States v. Darby, 312 U. S. 100 21
United States v. Greenwood Dairy Farms, Inc., 8 F. Supp. 398 9
United States v. H. B. Hood & Sons, 26 F. Supp. 672 19
United States v. Krechting, 26 F. Supp. 266 18
United States v. Rock Royal Co-Operative, Inc., 307 U. S. 533 ..... 15, 16, 17, 18
United States v. Schwarz, Civil Action No. 1480 (N. D. Ill.) 19
United States v. Stroop, 109 F. (2nd) 891 (C. C. A. Ohio (1940)) 12

Statutes:

Agricultural Adjustment Act of 1933 (Title U. S. C. A., Sec. 601, *et seq.*) 2, 8
Agricultural Adjustment Act (Act of May 12, 1933, as amended, Title U. S. C. A., Sec. 601, *et seq.*) 8, 11
Agricultural Marketing Agreement Act of 1937, Act of May 12, 1933, as re-enacted and amended (Title 7 U. S. C. A., Sec. 601, *et seq.*) 2, 4, 5, 8, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 744

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT THEREOF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Answering the Petition of United States of America for a writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, the Respondent Wrightwood Dairy Company, respectfully states that the writ of certiorari should not issue out of this Court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on October 27, 1941, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Question Presented.

The question is *not* as set forth on page 2 of the petition, "Whether Federal regulation of the price of intra-state

milk sold in competition with inter-state milk *is permissible* under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937," but rather whether the Respondent, defendant below, who admittedly was engaged solely in intra-state commerce and whose milk was in no wise inter-mingled with milk which crossed state lines, was a handler of milk as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a) (4) of Order No. 41, and as such was subject to the applicable provisions of the Act and the Order.

It is not contended by petitioner that the milk handled by the Respondent is in the current of inter-state commerce or directly burdens, obstructs or affects inter-state commerce in such commodity, but it is contended by the petitioner that the Agricultural Marketing Agreement Act of 1937 regulates milk wholly intra-state in character and handling *where the point of impingement of the intra-state transaction is one of competition only.*

Statutes and Order Involved.

Petitioner alleges that the statute involved only Section 8c of the Act of May 12, 1933, (48 Stat. 31) as amended, and as re-enacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937, but we submit that the entire Agricultural Marketing Agreement Act of 1937 is involved, not only Section 8c but also others such as Section 10(i)[1] and Section 10(j).[2]

---

[1] Section 10(i) provides that the Secretary of Agriculture shall co-operate with state authorities in order to effectuate the declared policy of said Act and in order to obtain uniformity in the formulation, administration and enforcement of federal and state programs relating to the regulation of the handling of agricultural commodities.

[2] Section 10(j) defines the term "inter-state or foreign commerce."

In order to ascertain the intent of Congress in enacting the Agricultural Marketing Agreement Act of 1937, and prior Acts re-enacted, the Senate and House Committee reports, together with the explanatory statements of members in charge in presenting the bill for passage, become material as the exposition of the legislative intents, which reports and debates were offered in evidence at the trial by Respondent.[3]

Respondent contends that Order No. 41 was not promulgated by the Secretary of Agriculture pursuant to the provisions of the Act and that the Order does not conform to and is contrary to said Act and is otherwise illegal and void, and filed a cross-appeal in the United States Circuit Court of Appeals, but in view of the decision affirming the judgment of the District Court, the Circuit Court of Appeals did not deem it necessary to discuss the errors assigned and dismissed the cross-appeal. (R. 274-275.)

While it is true that "the order was issued after a hearing and findings by the Secretary of Agriculture," we submit the fact to be that the hearing referred to, was not a hearing upon the Order promulgated by the Secretary of Agriculture but upon a proposed marketing agreement and order regulating the handling of milk prepared and proposed by the Pure Milk Association and Chicago Milk Producers Council, Inc. This proposed marketing agreement and order provided that the so-called Chicago, Illinois, marketing area was to include Chicago, Illinois, and all that territory lying within the boundaries of Cook County and Du Page County, Illinois, and the townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort and Crete in Will County, Illinois, and the townships of St. John, Ross, North Calumet and

[3] See defendant's exhibits A, B, C and D. (R. 203-217.)

Hobart, in Lake County in the State of Indiana. (See Def's. Ex. 3, pp. 3, 5.)[4]

The Chicago, Illinois marketing area in Order No. 41 covers only the territory within the corporate limits of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe, in the State of Illinois. (R. 11.) A comparison of the proposed marketing agreement upon which a hearing has been held, and the Order No. 41, discloses such a diversity of provisions that it cannot be said that the hearing upon the former was also a hearing upon the latter. The producers and handlers of milk had no opportunity to be heard upon Order No. 41 promulgated by the Secretary. No hearing was held by the Secretary upon the proposed Order 41 pursuant to the provisions of the Act as provided in Sections 8c(3), 8c(4), 8c(9) and 8c(10).[5]

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[4] The record before the Secretary of Agriculture was introduced in evidence as Def's. Ex. 1, 2, 3 and 4. This record has not been reprinted but has been certified to the court in its original form.

[5] Section 8c(3) of the Agricultural Marketing Agreement Act of 1937 provides: "• • • *he shall give due notice of and an opportunity for a hearing upon a proposed order.*"

Section 8c(4) provides: "*After such notice and opportunity for hearing,* the Secretary of Agriculture shall issue an order, if he *find* and *sets forth in such order,* upon the evidence introduced *at such hearing* (*in addition to such other findings as may be specifically required by this section*) that • • • "

Section 8c(9) provides: "Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers • • • to sign a marketing agreement relating to such commodity or product thereof, *on which a hearing has been held,* the Secretary of Agriculture, with the approval of the President determines: • • • "

Section 8c(10) provides: "*No order shall be issued* under this section *unless* it regulates the handling of the

Respondent respectfully directs the Court's attention to the fact that although the Secretary of Agriculture did, on August 28, 1939, promulgate Order No. 41 regulating the handling of milk in the Chicago Area, that during the pendency of this cause the Secretary of Agriculture did, on June 21, 1940, effective July 1, 1940, voluntarily execute and promulgate an Order No. 41, as amended, embracing new and different provisions, to regulate the handling of milk in the Chicago Area, and petitioner admitted the issuance of said amended order in its supplemental motion for summary judgment. (R. 144, 145).

STATEMENT.

In answer to the Complaint of the petitioner, Respondent, as defendant below, filed eleven (11) separate defenses, (R. 84-99, 104) and a supplemental answer (R. 118). Plaintiff's motion to strike the third (3rd) defense was denied and plaintiff's motion to strike the fourth (4th), fifth (5th), sixth (6th), seventh (7th), eighth (8th), ninth (9th), tenth (10th) and eleventh (11th) defenses were sustained. (R. 244.) The failure of the trial court to over-rule the motions to strike said defenses was made the basis of a cross-appeal in the United States Circuit Court of Appeals, Number 7620, but that court, in view of its decision, deemed it unnecessary to discuss the errors assigned and dismissed said cross-appeal. In order to preserve the rights of Respondent herein in the event this petition for certiorari should be granted, a cross-petition for a writ of certiorari to review the dismissal of said cross-appeal has been filed herein.

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commodity or product covered thereby in the same manner as and is made applicable *only to persons* in the respective classes in the industrial or commercial activity specified in, a marketing agreement *upon which a hearing has been held.*"

The evidence shows that the Respondent is a corporation organized under the laws of the State of Illinois; that it purchases and for some time past has purchased, approximately thirty thousand (30,000) pounds of milk a day from approximately seventy (70) producers located within the State of Illinois, and no part thereof is purchased from any producer located outside the State of Illinois; that said milk is processed by Respondent in its plant at Chicago and sold and distributed entirely within the Chicago marketing area within the State of Illinois, and that no portion thereof is intended to be sold or is sold for use outside of the State of Illinois, and that none of Respondent's milk was in any wise physically inter-mingled with milk which had crossed state lines. (R. 245-246.)

The court found as a fact that the defendant in the handling of milk was engaged in intra-state business and was not in the current of inter-state or foreign commerce, and did not directly burden, obstruct or affect inter-state or foreign commerce in milk marketed within the Chicago, Illinois marketing area, and found, as a matter of law, that said order did not apply to the defendant and that the defendant is not a handler of milk as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a)(4) of the Order, and is, as such, not subject to the applicable provisions of the Act and of the Order. (R. 246-247).

The court, however, found that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred (R. 245-246). This finding, defendant contended, by way of cross-appeal, was contrary to the law and evidence herein. (R. 259-261.)

ARGUMENT AGAINST GRANTING THE WRIT.

I.

The decision of the Court below followed the settled law as to which there is no conflict.

It is conceded that the Respondent in the handling of milk was engaged in intra-state business and was not in the current of inter-state or foreign commerce. Nevertheless, petitioner contends that Respondent is a handler and is subject to the provisions of the Agricultural Marketing Agreement Act of 1937 and of the Order, and bases its entire contention upon the assumption that under the law *one and only one* factual element is essential to subject the milk dealer whose operations are wholly intra-state in character to the provisions of the Order promulgated under said Act if the handler *competes* with other handlers of milk which cross State lines.

This contention presents a dangerous and revolutionary construction of the United States Constitution which would enable the Federal Government to control every legal enterprise, every occupation and business merely by showing that the product thereof is in competition with similar products which cross State lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other States. The authority of the Federal Government would embrace particularly all activities of the people, and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government. There would be no limit to Federal power, and the States and the people would be effectively deprived of

their rights theretofore reserved to themselves and guaranteed to them under Article 10 of the Amendments to the Constitution of the United States.[6]

We shall hereinafter show that plaintiff's contention is the result of wishful thinking and finds no support either in the provisions of the United States Constitution, the Acts of Congress, or in the decisions of the Supreme Court of the United States.

1. Congress did not intend in passing the Agricultural Marketing Agreement Act of 1937 and prior Acts to assume control of purely intra-state transactions, and the Act itself contains no such provision.

A brief history of the prior Acts which were re-enacted in the Agricultural Marketing Agreement Act of 1937 and the interpretation and construction of the Courts of these Acts fully sustain this contention.

(a) The Agricultural Adjustment Act of 1933 did not apply to all transactions where the products were produced and sold within the same state. (Title 7 U. S. C. A., Sec. 601, et seq.)

The Agricultural Adjustment Act of 1933, Section 608(3) authorized the Secretary of Agriculture "to issue licenses permitting processors, associations of producers and others to engage *in the handling in the current of inter-state or foreign commerce* of any agricultural commodity or product thereof or *of any competing commodity or product thereof.*" The Federal Courts in considering said Act uniformly held that a milk dealer purchasing all of his supply of milk in his State and selling all of said milk in said State was engaged in intra-state commerce and was not

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[6] *United States* v. *Butler*, 297 U. S. 1, 80 L. Ed. 477.
Schechter v. *United States*, 295 U. S. 495, 542.

subject to the control of the Federal Government under said Act.[1]

(b) Congress, in 1935, in amending the Act of 1933 did not intend that the provisions shall apply to transactions where the products were produced and sold within the same state.

On May 27, 1935, the Supreme Court unanimously rendered the decision in *Schechter* v. *United States*, 295 U. S. 495, 542. At that time Congress was in session and was then considering the amending of the Agricultural Adjustment Act of 1933 to clarify doubtful legal provisions in view of the decision in the *Schechter* case. This is made evident by the report of the committee submitted to the Senate on July 3, 1935, and the report to the House of Representatives on June 15, 1935, (R. 203, 204, 211) wherein it was stated that the amendments to the Agricultural Adjustment Act were needed *inter alia* "to insure that the program will be carried out within the limits of the powers given Congress under the Constitution."

Both Senate and House reports provide, among other things:

> "The powers to be exercised under the proposed bill are confined within the limitations upon the Federal authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases. (R. 207-211) * * *

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[1] *Douglas* v. *Wallace*, 8 F. Supp. 379, 383.
United States v. *Greenwood Dairy Farms, Inc.*, 8 F. Supp. 398, 400.
Royal Farms Dairy, Inc. v. *Wallace*, 8 F. Supp. 975, 977, 979.
Edgewater Dairy Company, Inc. v. *Wallace*, 7 F. Supp. 121, 122.
Allen v. *Wallace*, 12 F. Supp. 515.
Berdie v. *Kurtz*, 75 F. (2d) (C. C. A. 1935) 898.

"The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce, or to the handling thereof which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodities or products thereof. Section 8(2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof *'in competition with'* interstate or foreign commerce. This phrase has been *omitted* from the proposed section 8c(1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreements; *because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders* • • •. (R. 207-208)" (Italics ours.)

It will be noted that Congress intentionally omitted the phrase "in competition with" inter-state or foreign commerce from the Marketing Agreement Act of 1935 to avoid any possible construction that any product merely "in competition with" products in interstate or foreign commerce be deemed to come within the purview of the Marketing Agreement Act of 1935. This Act was subsequently re-enacted as a part of the Agricultural Marketing Agreement Act of 1937 without change.

That this was the deliberate intent of Congress is further evidenced by the debates in the Senate wherein it appears that those in charge of the Bill in the Senate emphasized and reiterated that the Bill was not intended to control any phase of the milk situation where the milk is produced

and where it is sold within the same State and said Bill was passed upon that distinct understanding.[8]

Committee reports and explanatory statements of members in charge made in presenting the Bill for passage are competent as an exposition of the legislative intent.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443, 475, 65 L. Ed. 349, 360.

Here, like in the *Duplex Printing Press Co.* case, it definitely appears that Mr. Senator Smith, who submitted the committee report to the Senate and who had the Bill in charge, had definitely agreed with the leading Senators on the floor that the Act was not intended to cover a situation where milk is produced in the State and sold within that State, and it was agreed that it was the sense of the Senate that the Government would have no right or control of any phase of the milk situation under such circumstances. This was the final word of the Senate on the subject and borrowing the language from the opinion in the *Duplex Printing Press Company* case, 254 U. S. 443, 475, 65 L. Ed. 349, 360,

> "was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported."

(c) The provisions of the Agricultural Adjustment Act of 1935 do not apply to transactions where the products were produced and sold in the same state.

The provisions of the Act have no application to a handler of milk who admittedly engaged solely in intra-

[8] Excerpts of these debates were admitted in evidence and are set forth in the record on pages 215-216.

state business. The mere fact that the products Respondent handles may be in competition with like products which cross state lines does not make it subject to the Act. By Section 8c(1) the Secretary of Agriculture is authorized to issue orders "provided *only* such handling of such agricultural commodity or product thereof as is in the current of inter-state or foreign commerce, or which directly burdens, obstructs or affects inter-state or foreign commerce in such commodity or product thereof." We submit that Congress, by use of the word "only" in the foregoing sections, clearly emphasized its determination that the Secretary of Agriculture was limited in the issuing of orders to such handling of products which actually were in the current of inter-state or foreign commerce which *directly* burdened, obstructed or affected inter-state commerce.

As heretofore shown Congress expressly eliminated the phrase "in competition with" contained in the earlier law and substituted the language found in the present law.

Where a revised statute or one enacted for another omits provisions contained in the original act, the parts omitted cannot be kept in force by the construction but are annulled.

In *United States* v. *Stroop*, 109 F. (2d) 891 (C. C. A. Ohio (1940)), the Court said at page 893:

> "The Congress must be presumed to know the language in former Acts and have judicial construction placed upon them, and if in subsequent legislation on the same subject different language is used, there is a presumption of a manifest intention to change the law. *Johnson* v. *United States*, 225 U. S. 406, 416, 56 L. Ed. 1142."

To the same effect, see:
U. S. Board of Commissioners, 26 F. Supp. 270, 274.
Stewart v. *Kahn*, 78 U. S. 493, 20 L. Ed. 176, 178.

It follows that the Courts must in order to give effect to the declared intent of Congress, construe the Act to mean that mere competition by an intra-state handler with similar products crossing state lines does not subject the handler to Federal regulation.

Congress clearly recognized that the State would control agricultural commodities involved solely in intra-state business and that it had no jurisdiction over such transactions. However, in order to secure uniformity in the enforcement of Federal and State programs regulating the handling of agricultural commodities, it enacted Section 10(i).

This Section provides that the Secretary of Agriculture, upon request of the duly constituted authorities of any *State*, is directed to confer with and hold joint hearings with the authorities of any State and to issue complementary orders to orders or other regulations issued by such State authorities.

In the committee reports in the Senate and in the House at the time of the passage of this section it was expressly pointed out that:

> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it *to permit or require the Federal Government to invade the field of the States*, for the limitations of the act and the Constitution forbid regulation in that field, and this provision does not indicate the contrary • • •. Each sovereignty operates in its own sphere." (R. 210).

The Supreme Court of the United States has fully recognized and sustained the validity of various State laws regulating the processing of milk pertaining to intra-state business in contra-distinction to interstate transactions.[10]

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[10] *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940.

Congress has no power to control all local enterprises under the pretext that it had an indirect effect on inter-state commerce merely because one was in competition with the other or that prices of the products in the industry might be affected.[11]

(d) The Agricultural Marketing Agreement Act of 1937 re-enacted all the provisions of the Agricultural Adjustment Act of 1933 and 1935, and its provisions do not apply to transactions where the product is produced and sold within the same state.

Section 10(j) defining inter-state or foreign commerce was added to the Act of 1935. There is nothing in the definition which in any wise supports petitioner's theory, that merely because the milk handled by the Respondent is in competition with other milk which has crossed State lines defendant was in any wise engaged or directly interfered with or obstructed inter-state commerce.

Had Congress intended that mere competition with inter-state products shall subject a purely intra-state transaction to Federal regulation, it would have stated so in plain and unmistakable terms. It would have retained and perhaps amplified the phrase "in competition with" in the subsequent enactments, instead of purposely omitting the same. It is evident that Congress did not so provide.

The Courts cannot legislate for Congress and read into the law something which Congress itself did not include

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Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752.

Hegeman Farms Corp. v. *Baldwin*, 293 U. S. 163, 79 L. Ed. 259.

[11] *Schechter* v. *U. S.*, 295 U. S. 495, 542.

Carter v. *Carter Coal Co.*, 298 U. S. 238.

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 259.

therein, and which as a matter of fact, Congress expressly intended to exclude.[12]

II.

The case presented by the petitioner and the question involved does not necessitate review and decision by this Court.

1. It is contended by petitioner that the decision below conflicts with *U. S. v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533. In that connection the United States Court of Appeals below held that this decision did not sustain petitioner's contention.[13]

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[12] *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649,

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

[13] The Court said; "We are not convinced that the case sustains his position. The Supreme Court did not have before it the issue of the applicability of an order to a distributor whose activities were wholly intrastate. In that case the court said (p. 541): 'The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid.' Further on in the opinion the court said (p. 568): 'There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce.' It is true that Mr. Justice Reed then said: 'Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk.' From this we believe the Supreme Court did not intend to preclude this important question, now before us, which was not an issue in the case before it." (R. 272.)

Petitioner contends however that one of the defendants in the *Rock Royal* case did challenge the power of Congress to regulate it on the ground that its activities were entirely intra-state and refers to an alleged answer filed by one defendant in the Trial Court. That this defense was expressly *waived* in the Supreme Court is evidenced by the Court's opinion. The appeal there involved two (2) orders, one promulgated by the Secretary of Agriculture and the other under the State Laws of New York. The Court held that these orders were in *pari materia*, but did not pass on the New York order for the reason that "The State order was eliminated from consideration *on the understanding* not questioned here, *that the milk of all four defendants is covered by the Federal order if valid.*"[14]

Aside from the fact that the Supreme Court did not pass upon the question here involved, the evidence in that case differs materially from the facts found in this case. In the *Rock Royal* case two-thirds (⅔rds) of the milk produced in the New York marketing area was found to have actually moved in interstate commerce and that the remaining one-third (⅓rd) produced within the State of New York *was physically and inextricably* intermingled with the interstate milk.[15]

In the present case, however, the Court found that none of Respondent's milk was physically inter-mingled with milk which had crossed State lines, (R. 158) and that over sixty (60%) per cent of the milk in the Chicago Area was produced in Illinois and the remaining milk sold in the Chicago marketing area was produced in Wisconsin, Indiana and Michigan. (R. 158.) In this connection it may be pointed out that the Supreme Court in the *Rock Royal*

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[14] *U. S.* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, pages 540-541.

[15] 307 U. S. 552-553.

case did not have before it the committee reports of the House and Senate nor the debates in Congress hereinbefore discussed to ascertain the intent of Congress.

The Order promulgated by the Secretary of Agriculture under consideration in the *Rock Royal* case recognized that there was some milk entirely in intra-state commerce over which the Federal Government had no control and which was regulated by the order of the Commissioner of Agriculture and Markets of the State of New York under State Laws and such intra-state handling of milk was expressly excepted from the order.

We submit that the *Rock Royal* case does not conflict with the decision below.

2. It is further contended by petitioner that the decision below is in direct conflict with the decision of the Circuit Court of Appeals in *U. S.* v. *Adler's Creamery, Inc.*, 110 F. (2d) 483, (certiorari denied, 311 U. S. 657).

Aside from the fact that the Court relied upon the inopposite remark made in the *Rock Royal* case, we submit that the facts differ materially from the one here under consideration. In that case it appeared that one-third (⅓rd) of the milk produced for sale in the New York metropolitan marketing area came from States other than New York, and about one-sixth (1/6th) of the milk produced in the State for sale in that marketing area crossed State lines on its way to that market, and that one-half (½) of all the milk produced for sale in that marketing area was actually moved in interstate commerce while being brought to market. There as in the *Rock Royal* case the committee reports and the debates in Congress were not considered, nor the Court's attention called to the fact that Congress had intentionally deleted the words "in competition with" in order to eliminate any possible interpretation of the Act that mere competition might be held

to bring an intrastate transaction within the Federal Commerce power.

The fact that *certiorari* was denied in the *Adler* case by the Supreme Court indicates no expression of opinion by the Supreme Court upon the merits of the case.[16]

3. Petitioner also relies upon several decisions of District Judges, all of which, however, are easily distinguishable either upon the facts or the law.

In *U. S.* v. *Krechting*, 26 F. Supp. 266, the District Judge relied entirely upon *Nebbia* v. *New York*, 291 U. S. 502, to sustain his arbitrary finding that intrastate transactions involving milk necessarily affected and burdened interstate commerce. The Court entirely ignored the fact that the *Nebbia* case involved the right of a State under its police powers to legislate and did not involve the question of interstate commerce.[17] In this connection it may be noted that the Supreme Court has concurrently with the confirming opinion in the *Rock Royal* case sustained the power of the State to legislate in regard to the distribution of milk within the State.[18]

In *United States* v. *Andrews*, 26 F. Supp. 123, relied upon by the petitioners, it appeared that the defendants were

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[16] *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401-403.

[17] *Douglas* v. *Wallace*, 8 F. Supp. 379, 383.

[18] In *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 570, the Court said: "The power of a State to fix the price of milk has been adjudicated by the Court. • • • It belongs to that category of commodities that for many years has been subjected to a regulatory power of the State." See also *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, where the Court said (p. 351): "Every State police statute necessarily will affect interstate commerce in some degree, but such statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

handlers of milk in the Boston area, who either produced or purchased milk from other producers in Massachusetts, and who also bought from other handlers who had received milk from producers outside of Massachusetts, the milk so purchased being *co-mingled* with the local milk and processed at their respective plants in Massachusets. In view of these facts, not found in the case here under consideration, the Judge there granted a temporary injunction.

In *United States* v. *H. B. Hood & Sons,* 26 F. Supp. 672, three (3) defendants were involved, two (2) of them purchased their milk outside of the State and the third one did both an interstate and intrastate business. It claimed exemption as to the intrastate character of its activities which the Court denied on the basis of *Currin* v. *Wallace,* 306 U. S. 1, and the *Shreveport* case, 234 U. S. 342. It is evident that these facts differ materially from those here under consideration.

In *United States* v. *Schwarz,* Civil Action No. 1480, Northern District of Illinois, Judge Barnes, without formal opinion, followed the dictum in the *Rock Royal* case. It does not appear from the opinion to what extent the particular defendant was engaged in interstate activities.

The facts in *Holbrook* v. *Wallace,* Civil Action No. 5811 (D. D. C.) are not available and cannot therefore be discussed.

4. Petitioner contends that the decision below conflicts with the fundamental constitutional doctrine that the power of Congress extends to the control of intrastate acts when necessary to the effective regulation or protection of interstate commerce, and in support thereof, cites various decisions, none of which, as we shall show, sustain its position.

An examination of these cases discloses that the particular intrastate transactions were regulated only because they had a direct effect on interstate commerce and were

closely co-mingled with or related to the interstate commerce.

In the *Shreveport* case, 234 U. S. 342, as in *Railroad Commission of Wisconsin* v. *C. B. & Q. R. Co.*, 257 U. S. 563, the Court merely held that in dealing with common carriers engaged in *both interstate and intrastate commerce*, involving the same trains serving interstate as well as intrastate transportation, Congress has the right to control their intrastate operations in order to prevent unjust discrimination in rates.

In *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41, relied upon by the petitioner, the Court held that "In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales in futures upon interstate commerce, we find no difficulty • • • in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest, and is subject to national regulation as such."

In *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 542, also relied upon by petitioner, the Court fully supports the position of Respondent herein and the decision is fully discussed by the lower court in its opinion. (R. 273.) An examination of the opinion in the *Schechter* case will disclose that the Supreme Court has not only distinguished most of the cases relied upon by petitioner herein, but effectively disposed of all of the contentions made by petitioner under this point.

In *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, it appeared that the defendant received its raw materials in Pennsylvania from its subsidiary companies in other States, processed the raw materials in Pennsylvania and then transported them through its vast transportation facilities all over the country. The business of the defendant was likened to that of the stock

yards in *Stafford* v. *Wallace*, 258 U. S. 495, and it was held that the activities of the defendant in effect constituted a stream or flow in interstate commerce which subjected the defendant to the *National Labor Relations Act*.

Currin v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38, and *United States* v. *Darby*, 312 U. S. 100, also relied upon by petitioner, were fully distinguished by the United States Circuit Court of Appeals in its opinion. (R. 272-273.)

We submit, therefore, that the judgment herein does not conflict with the decisions relied upon by petitioner herein, but merely conforms to the well settled constitutional limitations of the power of Congress over intrastate matters. The scope of the power of Congress to control interstate commerce must be considered in the light of our dual system of government.[19]

Petitioner contends that a program for the establishment of minimum prices for interstate milk cannot be effective if intrastate milk can be sold competitively without restriction, and in that connection, calls attention to the *dictum* of the Court below when it speculated as to the possible result upon the Order in view of the fact that the defendant was not subject to the regulation. There is not a *scintilla* of evidence in the record which in any wise indicates that the effective sanction of the order would fail because it did not

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[19] See *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 548, where the Court said at p. 548: "While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal Power, and for all practical purposes we should have a completely centralized government."

embrace handlers of milk who were engaged entirely in intrastate transactions and were in no wise involved in the regulation.

Answering a similar argument of the Government in the *Schechter* case that if persons engaged in the poultry business in intrastate commerce were not made subject to the provisions of the Federal Code (N. R. A.), competition with those under the Code would suffer and that the cutting of prices would bring "about a demoralization of the price structure," the Supreme Court said at p. 549:

> "Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the Federal Government may determine the wages and hours of employes in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employes, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power."

Suffice it to say that the State has jurisdiction and full plenary power to control the milk industry within its boundaries, and many States have undertaken that control.

Congress in enacting Section 10(i) of the Marketing Agreement Act of 1937, fully recognized the limitation of Federal authority in that field and expressly provided that in order to obtain uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricul-

tural commodities or products thereof that the Secretary of Agriculture may confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to co-operate with such authorities and to issue complementary orders to orders or other regulations issued by such State authorities, and further direct that the Secretary of Agriculture make available to State authorities the records and facilities of the Department of Agriculture and to accept and utilize with the consent of the State such State and local officers and employes as may be necessary.

So spoke Congress. Undoubtedly it recognized that there might be a difference in regulation in the milk industry which involved local intrastate commerce and that controlled by the Secretary of Agriculture under the Act. As to such intrastate commerce, Congress clearly did not intend to legislate, hence the provision for co-ordination between the State and Federal authorities.

Petitioner also relies upon *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, wherein the Court refused to construe the provisions of the Federal Trade Commission Act to read, "*unfair methods* of competition in (interstate) commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," because Congress had not so provided and the Courts could only enforce the law as written. Petitioner contends that the statute involved in the present case contains language omitted from the *Federal Trade Commission Act*. In the Federal Trade Commission Act Congress sought to regulate unfair methods of *competition* in interstate commerce, whereas in the Agricultural Marketing Agreement Act of 1937, Congress sought to regulate the price of certain commodities in interstate commerce. In the former, "unfair competition" was the gist of the evil sought to be regulated; in the latter, the matter of "competition" was definitely eliminated as a determining factor as to

whether the commodities were to be regulated or not when Congress intentionally deleted from the Act the words "in competition with" and re-enacted the Act with those words omitted.

Petitioner also contends that the ruling below is inconsistent with the familiar principle for which the *Shreveport* case stands. We have heretofore distinguished the *Shreveport* case and demonstrated that the Federal control applies only in the case of carriers who are engaged in *both interstate and intrastate transportation.*[20] The competitive discrimination against interstate rates as illustrated in the *Shreveport* case by a railroad engaged *both* in interstate and intrastate transportation has no application whatsoever to a situation where a handler of milk buys all of his milk within a State and sells it within the State, and where none of his activities partake of an interstate character other than that his milk might be in competition with milk which crosses State lines. There is hardly a single article produced or manufactured in common use which can be said not to be in competition with a similar article produced or manufactured across State lines.

To like effect is the quotation relied upon by petitioner from the dissenting opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329. In that case it appears from the dissenting opinion that each of the complainants were engaged both in interstate and intrastate commerce and that the principal business in each case was in interstate commerce, and therefore subject to Federal control on the principle announced in the *Shreveport* case and cited in the dissenting opinion. Mr. Justice Cardozo, however, recognized that the principle announced had no application to purely intrastate transactions where it does not directly or intimately affect interstate commerce.

[20] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38.

We submit that not a single case has been cited which holds that only one factual element is essential to subject a milk distributor whose operations are wholly intrastate in character to the Order, namely a showing that such milk distributor competes with handlers operating in the market who are subject to the regulation. As the United States Circuit Court of Appeals so aptly said in its opinion in this case—"to do so would be to subscribe to a view of causation which, as Justice Cardozo said in the *Schechter* case, *supra*, p. 554, 'would obliterate the distinction between what is national and what is local in the activities of commerce.'" (R. 274.)

5. We have shown that the decision of the Court below followed the settled law as to which there is no conflict. We submit that there is no showing in the record other than the statement of petitioner, in its petition, that the Order herein involved cannot operate unless uniformly applied to all handlers in the marketing area irrespective of whether they are subject to Federal control or not.

In answer to petitioner's statement, it suffices to say that under our dual form of government, as provided by the Constitution, the co-operation of the Federal Government and of the States is the only solution possible to any hiatus created by apparent disunity. This was clearly recognized by Congress when it enacted Section 10(i) of the Agricultural Marketing Agreement Act of 1937 and this situation cannot be changed except by amendment to the Constitution of the United States.

CONCLUSION.

It is respectfully submitted that because the question presented by the petition has been authoritatively an-

swered by both the legislature and the judiciary, the petition for certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

ALVIN E. STEIN,
Attorney for Respondent.

FILE COPY

Nos. 744 and 783

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

WRIGHTWOOD DAIRY COMPANY,
Cross-Petitioner,

vs.

UNITED STATES OF AMERICA,
Cross-Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF WRIGHTWOOD DAIRY COMPANY, RESPONDENT AND CROSS-PETITIONER.

ALVIN E. STEIN,
Attorney for Respondent and Cross-Petitioner.

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INDEX.

	PAGE
JURISDICTION	2
QUESTIONS PRESENTED	2
THE STATUTES AND ORDERS INVOLVED	3
STATEMENT	4
PLEADINGS AND PROCEEDINGS	6
(1) The Complaint	6
(2) The Answer	7
(3) Petitioner's motion to strike and for summary judgment	13
(4) The Court's decision, findings and final judgment	14
(5) Specification of errors to be urged in support of cross-petition in No. 783	15
SUMMARY OF ARGUMENT	16
ARGUMENT	22
PART ONE	
I *The intrastate distribution of products in competition with interstate commerce is not subject to federal regulation*	22
A. The cases involving milk orders do not dispose of the constitutional and statutory questions raised for the first time by petitioner herein	24
B. Congress may not under the commerce clause regulate purely intrastate transactions where the point of impingement of the intrastate transactions upon interstate transactions is one of competition only	31

PAGE

ARGUMENT

PART ONE (continued)

C. Congress did not intend in passing the Agricultural Marketing Agreement Act of 1937, and prior Acts, to assume control of purely intrastate transactions and the Act itself contains no such provisions 43

1. The Agricultural Adjustment Act of 1933 did not apply to transactions where the products were produced and sold within the same State (Title 7 U. S. C. A., Sec. 601, et seq.) 44

2. Congress in 1935, in amending the Act of 1933, did not intend that the provisions shall apply to transactions where the products were produced and sold within the same State 45

3. The provisions of the Agricultural Adjustment Act of 1935 do not apply to transactions where the products were produced and sold in the same State 52

4. The Marketing Agreement Act of 1937 re-enacted all of the provisions of the Agricultural Adjustment Act of 1933 and 1935, and its provisions do not apply to transactions where the product was produced and sold within the same State 55

5. The business of an intrastate handler of milk under the Marketing Agreement Act of 1937 does not directly affect interstate commerce merely because his product competes with interstate handlers 58

PAGE

ARGUMENT

PART ONE (continued)

6. The finding of the Secretary that all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct or affect interstate commerce, is not authorized by law, contrary to the fact, and of no legal effect 61

II *Petitioner is precluded from urging that the Court had no jurisdiction to issue an injunction against the United States, having failed to urge this point in the lower courts. The injunction was nevertheless properly granted* 63

PART TWO

I *The District Court erred in finding contrary to the law and the evidence that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred* 67

1. The Secretary of Agriculture did not give due notice of and opportunity for a hearing upon Order No. 41, herein sought to be enforced 67

2. Order No. 41 never became legally effective because the required approval of producers was never properly secured 74

(a) The Order is void on its face in failing to comply with Sections 8c(4) and 8c(9) of said Act 76

(b) Order No. 41 was illegal in that all of the producers entitled to participate in the referendum under the Act were not notified nor permitted to participate therein 77

PAGE

ARGUMENT.

PART TWO (continued)

3. The Order is contrary to the express provisions of Section 8c(5)(G) of the Act, and other provisions thereof, and therefore void 81

4. The Order is contrary to the express provisions of Sections 2 and 8e of the Act of Congress and therefore void 82

II *The District Court committed prejudicial error in striking respondent's fourth to eleventh defenses, both inclusive* 92

1. The fourth defense 92
2. The fifth defense 92
3. The sixth defense 96
4. The seventh defense 98
5. The eighth and ninth defenses 98
6. The tenth defense 99
7. The eleventh defense 101
8. The twelfth defense 101

CONCLUSION 103

APPENDIX

Proposed marketing agreement submitted for hearing i

Excerpts from testimony, (Res. Ex. 3) x

Tables xiii

CITATIONS.

Cases:

Adams v. *Mills*, 286 U. S. 397, 416, 417 63

Allen v. *Wallace*, 12 F. Supp. 515 44

W. Ames & Co. v. *Wallace*, 81 F. (2d) 414 103

Arthur v. *Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438 60

Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193 85

PAGE

CITATIONS.

Cases (continued):

Berdie v. *Kurtz*, 75 F. (2d) (C. C. A. 1935) 898 44

Berry v. *Davis*, 242 U. S. 458 103

Board of Trade v. *Olsen*, 262 U. S. 1, 67 L. Ed. 839 36

Brown Chemical Co. v. *Meyer*, 139 U. S. 540, 544 31

Carroll v. *Carroll*, 16 Howard (U. S.) 275, 14 L. Ed. 936 27

Carter v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160 ..... 23, 39, 53, 62

Champlin Refining Co. v. *Commission*, 286 U. S. 210, 243 82

Citizens' Light, etc., Co. v. *Montgomery Light, etc., Co.*, 171 Fed. 553, 560 32

City of Paducah v. *Paducah Water Co.*, 258 F. 20, 22 103

Cline v. *Frink Drug Co.*, 274 U. S. 445, 463 82

Cohens v. *Virginia*, 6 Wheat. 399; 5 L. Ed. 257 28

Columbus Milk Producers v. *Wallace*, 8 F. Supp. 1014 65

Colorado v. *Toll*, 268 U. S. 228, 230 65

Currin v. *Wallace*, 306 U. S. 1; 83 L. Ed. 441 ..... 29, 30, 37

Douglas v. *Wallace*, 8 F. Supp. 379, 383 ..... 29, 44, 61

Duplex Printing Co. v. *Deering*, 254 U. S. 443, 475; 65 L. Ed. 349, 360 50

Edgewater Dairy Co. Inc. v. *Wallace*, 7 F. Supp. 121, 122 ..... 44, 65

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349; 85 L. Ed. 531 (1941) 40, 60

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, 649 104

Florida v. *United States*, 282 U. S. 194, 215 85

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 259; 67 L. Ed. 237, 243 53

H. P. Hood & Sons v. *United States*, 307 U. S. 588, 598 ..... 67, 75, 79, 91

Lane v. *Watts*, 234 U. S. 525, 540 65

PAGE

CITATIONS.

Cases (continued):

Marbury v. *Madison*, 1 Cranch 137; 2 L. Ed. 60 28
Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346; 83 L. Ed. 752 ..... 29, 41
Minnesota Rate Cases, 230 U. S. 352; 57 L. Ed. 1511 34
Mulford v. *Smith*, 307 U. S. 38; L. Ed. 1093 ..... 29, 87
Murphy v. *Utter*, 186 U. S. 95, 105 102
Nassau Smelting & Refining Works v. *United States*, 266 U. S. 101 65
National Labor Relations Board v. *Jones & Laughlin Steel Co.*, 301 U. S. 1; 81 L. Ed. 893 37
Nebbia v. *New York*, 291 U. S. 502; 78 L. Ed. 940 ..... 29, 41
Panama Ref. Co. v. *Ryan*, 293 U. S. 388, 432 ..... 65, 76, 85
Parks v. *Libby-Owens-Ford Glass Co.*, 360 Ill. 130, 140 82
Philadelphia Company v. *Stimson*, 223 U. S. 605, 622 65
Royal Farms Dairy Inc. v. *Wallace*, 8 F. Supp. 975, 977 ..... 44, 62, 65
Railroad Commission of Wisconsin v. *C. B. & Q. R. Co.*, 257 U. S. 563 ..... 36, 38
Schechter v. *United States*, 295 U. S. 495; 79 L. Ed. 1570 ..... 16, 23, 34, 36, 37, 38, 44, 59
Selected Products Corp. v. *Humphreys*, 86 F. (2d) 821 (C. C. A. 7th) 103
Shreveport Case, 234 U. S. 342 ..... 30, 36, 38
Sonzinsky v. *United States*, 300 U. S. 506, 514 63
Stafford v. *Wallace*, 258 U. S. 495; 66 L. Ed. 735 37
Stewart v. *Kahn*, 78 U. S. 493; 20 L. Ed. 176, 178 58
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38; 80 L. Ed. 1033 ..... 62, 89
The Paquete Habana, 175 U. S. 677, 685 102
United States v. *Andrew*, 26 F. Supp. 123 30
United States v. *Adler's Creamery, Inc.*, 110 F. (2d) 483 28

PAGE

CITATIONS

Cases (continued):

United States v. *Board of Commissioners*, 26 F. Supp. 270, 274 58

United States v. *Butler*, 297 U. S. 1; 80 L. Ed. 477 ..... 23, 33

United States v. *Chicago M. St. P. & P. R. Co.*, 294 U. S. 499 85

United States v. *Cohen Grocery Co.*, 255 U. S. 81 82

United States v. *Darby*, 312 U. S. 100 37

United States v. *Greenwood Dairy Farms, Inc.*, 8 F. Supp. 398, 400 ..... 44, 65

United States v. *Grimaud*, 220 U. S. 506 94

United States v. *H. B. Hood & Sons*, 26 F. Supp. 672 30

United States v. *Krechting*, 26 F. Supp. 266 29

United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; 83 L. Ed. 1447 ..... 16, 24, 26, 29, 41, 86, 93, 95, 100

United States v. *Schwarz*, Civil Action No. 1480 (N. D. Ill.) 30

United States v. *Shaw*, 309 U. S. 495 ..... 18, 65

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225 98

United States v. *Stroop*, 109 F. (2d) 891 (C. C. A. Ohio (1940)) 58

United States v. *The Thekla*, 266 U. S. 328 65

United States v. *Tynen*, 11 Wall. 88, 95; 20 L. Ed. 153, 155 102

Waite v. *Macy*, 246 U. S. 606, 610 65

Williams v. *United States*, 289 U. S. 553, 568 28

Williamson v. *United States*, 207 U. S. 462 95

Zellerbach Paper Company v. *Helvering*, 293 U. S. 172, 182 63

PAGE

CITATIONS.

Statutes:

Agricultural Adjustment Act of 1933 (Title 7 U. S. C. A. Sec. 601, *et seq.*) 44

Agricultural Adjustment Act (Act of May 12, 1933, as amended, Title 7 U. S. C. A., Sec. 601, *et seq.*) 45

Agricultural Marketing Agreement Act of 1937, Act of May 12, 1933, as re-enacted and amended (Title 7 U. S. C. A., Sec. 601, *et seq.*) 55, 56, 68, 74, 81, 82, 83, 84, 92, 93

Anti-Trust Laws 96

Bituminous Coal Act, April 26, 1937 (Title 15 U. S. C. A., Sec. 832 (d)) 97

Motor Carrier Act of 1935, as amended (Title 49 U. S. C. A. Sec. 313 (f)) 97

National Industrial Recovery Act, June 16, 1933 (Title 15 U. S. C. A. Sec. 701) 97

Orders:

Order No. 41 ..... 2, 4, 11, 18, 67, 74, 76, 77, 81, 82, 99

Order No. 41, as amended 4, 12, 99, 101, 102

Miscellaneous:

Congressional Record 51, 52

Federal Rules of Civil Procedure, Rule 13 (d) 66

House of Representatives Committee Report 45, 46

Senate Committee Report 45, 46

Tenth Amendment, Constitution of the United States 33

Tucker Act, of March 3, 1887, as amended, 28 U. S. C. A. 41, Sec. 20 ..... 64, 66

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Cross-Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF WRIGHTWOOD DAIRY COMPANY, RESPONDENT AND CROSS-PETITIONER.

The opinion of the Circuit Court of Appeals (R. 270) has been reported in 123 F. (2nd) 100.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 275). The petition for certiorari in No. 744 was filed November 14, 1941, and the cross-petition for certiorari in No. 783 was filed December 4, 1941. Both petitions were granted December 8, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Petitioner, does not, in its brief, correctly set forth the questions presented in No. 744.

(1) The question is *not* as set forth in Point 1 (under 1) "Whether Federal regulation of the price of intrastate milk sold in competition with interstate milk *is permissible* under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937," but rather whether the Respondent, defendant below, who admittedly was engaged solely in intrastate commerce and whose milk was in no wise inter-mingled with milk which crossed state lines, was a handler of milk as defined in Section 8c(1) of the Agricultural Marketing Agreement Act of 1937 and in Section 941.1(a)(4) of Order No. 41, and as such was subject to the applicable provisions of the Act and the Order.

It is not contended by petitioner that the milk handled by the Respondent is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce in such commodity, but it is contended by the petitioner that the Agricultural Marketing Agreement Act of

1937 regulates milk wholly intrastate in character and handling *where the point of impingement of the intrastate transaction is one of competition only.*

(2) The alleged question whether the District Court had jurisdiction to enjoin United States and its officials from enforcing Order No. 41 against the Respondent, now for the first time urged in this Court, is not involved herein. This question was not raised or argued in the District Court or in the United States Circuit Court of Appeals.[1]

In No. 783 the following questions are presented:

(3) Whether the District Court erred in striking the Respondent's fourth (4th) to eleventh (11th) defenses, inclusive.

(4) Whether the District Court erred in finding that Order No. 41 was issued in full compliance with the law and that all conditions precedent to its effectiveness had occurred.

(5) Does this case present a moot question in view of the abandonment of Order No 41 by the Secretary of Agriculture during the pendency of the cause when he promulgated Order No. 41, as amended, in its place.[2]

The foregoing questions include the questions presented by petitioner in its brief and other related questions, hereinafter discussed.

THE STATUTES AND ORDERS INVOLVED.

The Statute involved is the Act of May 12, 1933, (48 Stat. 31) as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the Agricultural Marketing Agree-

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[1] See brief filed in the United States Circuit Court of Appeals No. 7619.

[2] See Respondent's Twelfth Defense (R. 118-119).

ment of 1937, approved June 3, 1937 (50 Stat. 246) (7 U. S. C. A. Sec. 601 *et seq.*) herein referred to as the "Act".

Order No. 41 herein relied upon by the petitioner regulating the handling of milk in the Chicago, Illinois marketing area was promulgated by the Secretary of Agriculture on August 28, 1939, effective September 1, 1939 (R. 8-22).

On June 21, 1940, during the pendency of this action below, the Secretary of Agriculture promulgated another order effective July 1, 1940, Order No. 41 as amended, in the place of said Order No. 41.[3]

* * *

STATEMENT.

Order No. 41, herein relied upon by the Government, was promulgated by the Secretary of Agriculture under the following circumstances:

The uncontradicted evidence shows that the Secretary of Agriculture gave notice of a public hearing on June 9, 1939, regarding a proposed marketing agreement and order regulating the handling of milk "prepared and proposed by the Pure Milk Association and the Chicago Milk Producers Council, Inc.", covering the territory lying within the limits of Chicago, Illinois, and all that territory lying within the boundaries of Cook County, Du Page County, in the State of Illinois, and townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort and Crete, in Will County, in the State of Illinois, and the

[3] Order No. 41, as amended, established *inter alia* a new marketing area and materially changed the various classes of persons who were subject to its provisions and reclassified its products and substituted different provisions. The amended Order did not preserve any existing rights under Order No. 41 (R. 120-141).

townships of St. John, Ross, North Calumet, and Hobart, in Lake County, in the State of Indiana (Defs. Ex. 1, p. 28).

All of the evidence taken at the hearing was with respect to the proposed marketing agreement and the proposed marketing area as therein defined.[4]

The Secretary of Agriculture apparently decided not to proceed with the proposed marketing agreement and order, and no action was taken thereon. On August 18, 1939, without notice of and without an opportunity for a hearing thereon, the Secretary of Agriculture submitted *to some of the producers, but not to all*[5] for referendum, *a new and different marketing agreement or Order No. 41*,[6] covering a much smaller territory, namely the City of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe in the State of Illinois and containing different provisions.

In the referendum all of the producers selling milk in the area were not notified by the Secretary of Agriculture and did not participate therein, and said Order was not approved or favored by two-thirds (⅔) of all of the producers in the area.

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[4] Respondent, defendant below, introduced at the hearing defendant's Exhibits 1, 2, 3 and 4 which are admitted by petitioner, plaintiff below, to constitute all of the evidence upon which the Secretary of Agriculture made his findings and fixed the terms and provisions contained in Order No. 41 (R. 201). This record has not been reprinted but has been certified to the Court in its original form.

[5] See affidavit of Mr. Connor, Referendum Agent (R. 115) and testimony of Mr. Krueger, Chief Sanitary Officer of Board of Health of City of Chicago (R. 220, 221).

[6] See Order No. 41 (R. 8-22) and compare with Marketing Agreement set forth and considered at public hearing defendant's Exhibit 1, p. 28, attached as an appendix hereto, p. i.

PLEADINGS AND PROCEEDINGS.

(1) The Complaint.

The complaint was filed December 26, 1939, by United States of America, petitioner herein, in which it sought to compel Respondent to comply with Order No. 41 (R. 2-7). It alleged that the Order was issued in full compliance with the Act and that all conditions precedent to its effectiveness have occurred; that since prior to the effective date of this order, the defendant, an Illinois corporation, has been engaged continuously in purchasing and receiving milk from producers, associations of producers, or other handlers, all or a portion of which milk is disposed of as milk or cream in the marketing area; that the milk handled by the said defendant is processed by the defendant in its plant in Chicago and is sold and distributed within the area in competition with all other milk sold in said area. It is conceded that the defendant purchased all of its milk from producers located within the State of Illinois, but it is alleged that such handling of milk by the defendant is in the current of interstate commerce as defined in Section 10 (j) of the Act, or directly burdens, obstructs, or affects interstate commerce in milk marketed within the area and that the defendant, is, therefore, a handler of milk as defined in Sec. 8c (1) of the Act and in Sec. 941.1(4) of the Order, and as such is subject to the applicable provisions of the Act and of the Order.

The complaint further alleged that the defendant has failed and refused to make the required reports to the market administrator and sought a preliminary and permanent injunction against the defendant preventing and re-

straining the defendant from violating the provisions of the Order and commanding the defendant to comply with all the provisions of the Order.

(2) The Answer.

The answer of the defendant sets up twelve (12) separate defenses.

a. *The First Defense.*

The first of these defenses asserts that the complaint fails to state a claim against the defendant on which relief can be granted.

b. *The Second Defense.*

The second defense contains the defendant's response to the specific allegations of the complaint. The substance of this response is as follows: The defendant admits that it is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business at 2942 North Ashland Avenue, Chicago, Illinois; that since and prior to the effective date of the order it has been engaged continuously in purchasing and receiving milk from producers, associations of producers, or other handlers, all of which milk is disposed of as milk or cream in the marketing area; and that it purchases, and for some time past has purchased, approximately 30,000 pounds of milk a day from approximately 70 producers located entirely within the State of Illinois, and no part thereof is purchased from any producer located outside of the State of Illinois; that said milk is processed by said defendant in its plant at Chicago and sold and distributed entirely within the Chicago marketing area within the State of Illinois and that no portion thereof is intended to be sold, or is sold, for use outside the State of Illinois.

The defendant denies that the Order was issued in full compliance with law (R. 84); denies that its handling of milk is in the current of interstate commerce or directly burdens, obstructs or affects interstate commerce in milk marketed within the area, denies that it is a handler of milk as defined in Sec. 8c (1) of the Act and in Sec. 941.1 (4) of the order; denies that approximately 40% of all the milk sold in the area is directly in the current of interstate commerce; denies that there is any current of interstate commerce in the marketing area; denies that any portion of the milk handled by the defendant prior to its ultimate disposition by the defendant is physically and inextricably intermingled in the processing plant of the defendant with milk which has crossed state lines; denies that unless all milk sold in the area, whether or not physically intermingled, is subject to the same regulation as the milk which has crossed state lines on its way into the area, discrimination will result against the milk which has moved in the current of interstate commerce, as such milk will be unable to compete with unregulated milk in the area, and that such discrimination would lead to unstable and disorderly marketing conditions and prevent the effectuation of the purpose of the Act, as alleged in paragraph 7 of the complaint; denies that the defendant's failure to comply with the provisions of the Order would deprive the producers in the market of money which is rightfully theirs, and asserts that, on the contrary, "said producers so engaged in interstate commerce would not be entitled to any contribution from this defendant and that the enforcement of the said Order against this defendant would result in taking the defendant's property without due process of law in violation of the Fifth Amendment to the United States Constitution" (R. 84-87).

Finally, the second defense sets up an averment that the order was not "approved or favored by at least two-thirds

of all the producers who during the representative period determined by the Secretary were engaged within the production area in the production for market of the milk, or engaged in the production of milk for sale, in the marketing area, as set forth in the Order * * *." (R. 87).

c. *The Third Defense.*

The third defense alleges that the plaintiff is not entitled to any relief because the Acts of Congress under which these proceedings are brought have no application to this defendant; that the defendant is engaged entirely in intrastate business in the State of Illinois, the purchasing all of its milk, and the processing and sales of its milk was confined within the limits of the State of Illinois; that none of the milk handled and processed by said defendant is directly or indirectly in the current of interstate commerce, and that no portion of the milk handled by the defendant, prior to its ultimate disposition by the defendant, is physically and inextricably in any wise intermingled in the processing plant of said defendant with milk which has crossed state lines; that the handling of said milk by the defendant did not directly burden, obstruct or affect interstate or foreign commerce in such commodity; that it appears from the records and proceedings of Congress at the time said Acts were enacted and amended that Congress did not intend to include any handler of agricultural products who was engaged solely in intrastate business, as shown by the reports of committees of the House of Representatives and of the Senate of the United States, in 1935, that the powers to be exercised by the Secretary of Agriculture under said Acts were to be confined within the limitation upon the federal authority over interstate commerce as expressed by the Supreme Court in *Schechter* v. *United States,* 295 U. S. 495; that the amendments to the Agricultural Adjustment Act made by Congress on August 24, 1935, and as

re-enacted and amended in the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937, would not have been enacted by the United States Senate except upon the express understanding that it was the sense of the Senate that those in charge of the administration of this provision would have no right to issue orders which would take over the Government or control or the price fixing or any other phase of the milk situation where the milk is produced and where it is sold always within the same state, and that any other construction subjecting this defendant to the provisions of this Act would constitute and be a violation of the Commerce Clause, Article I, Section 8, Clause 3, and of Article X of Amendments to the United States Constitution, and render said Act therefore unconstitutional and void (R. 87-89).

d. *The Fourth Defense.*

The fourth defense challenges the Secretary's adoption of the post-war period, 1919-1929, in determining the purchasing power of milk for the purposes of the order and asserts that by reason thereof, the Order is repugnant to the provisions of the Act, and, therefore is illegal and void. (R. 89-91).

e. *The Fifth Defense.*

The fifth defense asserts that the Act delegates legislative powers to the Secretary and is therefore unconstitutional. (R. 91-92).

f. *The Sixth Defense.*

The sixth defense asserts that the Order "creates, fosters, and provides for an unlawful monopoly * * *," is contrary to the federal anti-trust laws and is, therefore, invalid. (R. 92-93).

g. *The Seventh Defense.*

The seventh defense asserts that the Order is contrary to the positive law and the public policy of the State of Illinois with respect to restraints of trade and is, therefore invalid and void under Articles IX and X of the Amendments to the Constitution of the United States (R. 93-94).

h. *The Eighth Defense.*

The eighth defense asserts that the definition of the term "producer" contained in the Order is contrary to the provisions of Sec. 8c (5) (G) of the Act (Title 7 U. S. C. A. Sec. 608c (5) (G) and "illegally delegates legislative authority to any health authority, whether federal, state, municipal, public or private * * *" and that, therefore, the Order is invalid (R. 94-95).

i. *The Ninth Defense.*

The ninth defense asserts that said Order No. 41 did not become effective and is, therefore, null and void, in that the referendum conducted by the Secretary of Agriculture pursuant to Section 8c (9) and 8c (19) was not a referendum of all of the producers who during the representative period determined by the Secretary were engaged within the production area specified of such commodity for sale in the marketing area specified in such marketing Order, and that said Order was not in fact approved or favored by at least two-thirds of all of the producers as required in and by Section 608c (9) of said Act, and that such action was contrary to the provisions of the Act and that, therefore, the Order never became effective for want of the requisite producer approval (R. 96).

j. *The Tenth Defense.*

The tenth defense asserts that, by reason of its failure to include in the territory comprising the marketing area other cities, towns and villages, such as, Oak Park, Berwyn, Cicero, Elmwood Park, Maywood, River Forest, Chicago Heights and others, the Order is unlawful, discriminatory, unreasonable and void (R. 97).

k. *The Eleventh Defense.*

The eleventh defense sets forth certain economic facts and statistics intended to show that the effect of the Order will be an increase of the surplus of milk in the market, and asserts that the Order is economically unsound and will not accomplish the declared purpose of the Act and is, therefore, "unreasonable, unenforceable and void" (R. 97-99).

l. *The Twelfth Defense.*

On September 9, 1940, the defendant by leave of court filed a supplemental answer setting forth a twelfth defense in which it was asserted that by reason of the fact that on July 1, 1940, certain amendments to the order had been issued by the Secretary June 21, 1940, and had become effective July 1, 1940, the order, as originally issued, had become inoperative, void, and unenforceable and the action had become moot (R. 118-119). A copy of the order, as amended June 21, 1940, was attached to the supplemental answer as Exhibit A and appears in the record at pages 120-141, inclusive. Respondent's motion to require petitioner to reply to said twelfth defense was denied (R. 117), but the petitioner filed a supplemental motion for summary judgment admitting therein that Order No. 41, as amended, issued by the Secretary of Agriculture of the United States on June 21, 1940, effective July 1, 1940, was so promulgated by the Secretary of Agriculture (R. 144-145).

m. *The Counterclaim.*

The counterclaim reiterates the facts asserted in the answer with respect to the organization of the defendant and the operation of its business and asserts that the defendant is not a handler subject to the Order. The counterclaim further incorporates the third to eleventh defenses, inclusive, pleaded in the answer, and asserts that by reason thereof the Act and the Order are not valid and enforceable as against the defendant. The counterclaim prays that the complaint be dismissed and that the court issue a permanent injunction preventing and restraining the plaintiff from enforcing the Order or any of its provisions against the defendant (R. 99-101).

(3) Petitioner's motions to strike and for summary judgment.

Plaintiff below, petitioner herein, filed its motion to dismiss defendant's counterclaim (R. 101) and to strike the third to eleventh defenses of respondent's answer (R. 156). The Court denied the motion to dismiss the counterclaim and the motion to strike the third defense, but sustained the motion to strike the fourth to eleventh defenses (R. 244). The striking of these defenses is one of the questions to be reviewed in Cross-Petition No. 783.

On June 19, 1940, plaintiff moved (R. 105-112) for a summary judgment in its favor on affidavits filed and served with the motion. Respondent filed a motion to strike said affidavits and parts thereof on the ground, amongst others, that the affidavits and material allegations therein contained were based upon hearsay and failed to contain sworn and certified copies of all papers and parts thereof therein referred to as required by Rule 56, of the Rules of Civil Procedure, were argumentative, and contained conclusions of law and not statements of fact. (R. 145-154).

This motion was partially heard (R. 154) and continued to a later date. No formal order was entered thereon but presumably was considered by the court at the time plaintiff's motion for summary judgment was denied (R. 157-159).

(4) The Court's decision, findings and final judgment.

The Court found as a fact that the defendant in the handling of milk was engaged in intrastate business and was not in the current of interstate or foreign commerce and did not directly burden, obstruct or affect interstate commerce of milk marketing within the Chicago, Illinois area, and found as a matter of law that said Order did not apply to the defendant, and that the defendant is not a handler of milk as defined in Sec. 8c (1) of the Agricultural Marketing Agreement of 1937 and in Sec. 941.1 (a) (4) of the Order, and is as such not subject to the applicable provisions of the Act and of the Order (R. 246-247). The Court has found that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness have occurred (R. 245-246). This finding is another question to be reviewed in the cross-petition in No. 783. The court entered final judgment dismissing the complaint filed by the petitioner and granted the respondent the injunctive relief prayed for in the counterclaim (R. 247-248). The Circuit Court of Appeals affirmed the judgment, but that court, in view of its decision, deemed it unnecessary to discuss the errors assigned by cross-petitioner and dismissed said cross-appeal (R. 275). The failure of the lower court to consider the errors relied upon and urged on cross-appeal and in dismissing the cross-appeal is the subject matter of cross-petition on No. 783.

(5) Specification of errors to be urged in support of cross-petition in No. 783.

The Circuit Court of Appeals erred in refusing to consider the errors, and each of them, relied upon by cross-petitioner in its cross-appeal in that court, and in dismissing said cross-appeal.

Specifically, the Circuit Court of Appeals erred:

1. In failing to find that the District Court should have found from the uncontradicted evidence and the law that Order No. 41 was not in compliance with the law and that all conditions precedent to the effectiveness of said Order had not occurred and that said Order was therefore contrary to the provisions of the Act in question and therefore invalid and not enforcible.

2. In failing to find that the District Court erred in sustaining plaintiff's motion to strike defendant's fourth to eleventh defenses, and each of them, filed by defendant to plaintiff's complaint.

3. In failing to hold that the case presented only a moot question, since Order No. 41 became ineffective during the pendency of the cause in the District Court.

SUMMARY OF ARGUMENT.

PART ONE.

I.

The intrastate distribution of products in competition with interstate commerce is not subject to federal regulation.

A. *United States* v. *Rock Royal Co-operative, Inc.*, and other cases relied upon by petitioner do not dispose of the constitutional and statutory questions raised for the first time by petitioner herein.

B. Congress may not under the Commerce Clause regulate purely intrastate transactions where the point of impingement of the intrastate transactions upon interstate transactions is one of competition only. Such a construction would violate the Tenth Amendment of the Constitution. While Congress is authorized by the Commerce Clause of the Constitution to regulate commerce among the several States, it does not authorize Congress under the guise of regulating interstate commerce between States to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce.

Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of the State power. A commodity wholly intrastate in character and handling does not directly burden, obstruct or affect interstate commerce where the point of impingement of the intrastate transactions upon the interstate transactions is one of competition only. *Schechter* v. *United States*, 295 U. S. 495, 520, 548.

C. Congress did not intend, in passing the Agricultural Marketing Agreement Act of 1937, and prior acts, to assume control of purely intrastate transactions, and the Act itself contains no such provisions. Both the Senate and House reports and Senate debates involving the Act in question, clearly show that Congress intended that the proposed Bill be confined within the limitation of the Federal authority over interstate commerce, as expressed by the Supreme Court in the *Schechter* case, and that it would not apply to a situation where milk was produced and where it is sold within the same State. That competition was not to be the basis of the point of impingement upon interstate commerce by an intrastate transaction is evidenced by the fact that Congress expressly omitted such provisions from a prior Act. The fact that Congress in subsequent legislation on the same subject used different language indicates a manifest intention to change the law.

The contention of petitioner presents a dangerous and revolutionary construction of the Commerce Clause which would enable the Federal Government to control every enterprise, every occupation and every activity of the people merely by showing that the product involved is in competition with similar products which cross State lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other States and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government.

II.

Petitioner is precluded from urging that the Court had no jurisdiction to issue an injunction against the United States, having failed to urge this point in the lower Courts. The injunction was nevertheless properly granted under

the Tucker Act of March 3, 1887, as amended, 28 U. S. C. A. 41 (20); *United States* v. *Shaw*, 309 U. S. 495, relied upon by petitioner has no application to the case here under consideration.

PART TWO.

I.

The District Court erred in finding, contrary to the law and the evidence that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred. The Statute was not followed in that:

1. The Secretary of Agriculture did not give due notice of an opportunity for a hearing upon Order No. 41. There was no hearing had with respect to Order No. 41. No notice or opportunity for a hearing was given by the Secretary of Agriculture to the producers or handlers of the product contrary to the express provisions of the Act. The public hearing, upon which the Secretary of Agriculture relies, was with reference to another marketing agreement differing materially in substance from that of Order No. 41, so that it cannot be said that the hearing upon the former was also a hearing upon the latter. The Act clearly contemplates that a hearing must be held before any order issued pursuant to the Act may become effective. Section 8c(9).

2. The Order never became legally effective because the required approval of producers was never properly secured. This was made a condition precedent under Section 8c(9) of the Act.

(a) The Order is void on its face in failing to comply with Sections 8c(4) and 8c(9) of said Act.

The recital in the Order that over sixty-seven (67%) per cent of the producers voting in a referendum had approved or favored the Order does not comply with the requirements of said sections and said order is therefore unenforcible and void.

(b) The Order is illegal in that all of the producers entitled to participate in the referendum under the Act were not notified nor permitted to participate therein. The uncontradicted evidence shows that all producers who were entitled to vote under Section 8c(9) were not requested to participate in the referendum on the tentatively proposed marketing agreement or order.

3. The Order is contrary to the express provisions of Section 8c(5)(G) of the Act and other provisions thereof, and therefore void.

4. The Order is contrary to the express provisions of Sections 2 and 8c of the Act and therefore void. The Secretary adopted the post-war period, August 1909-July 1929, as the base period instead of the pre-war period, August 1909-July 1914, as in Section 2 of the Act expressly provided. While the Secretary is permitted, under Section 8e, to use the post-war period instead of the pre-war period, as provided in Section 2, it is conditioned upon the Secretary finding and proclaiming in the Order that the satisfactory statistics were not available for the base period in Section 2. This finding must be explicitly set forth in the order under Section 8c(4) and a failure so to do is a fatal defect, (*Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 432,) and the law is not satisfied by a separate proclamation.

II.

The District Court committed prejudicial error in striking defendant's fourth to eleventh defenses, both inclusive. Some of these defenses were argued under Point I *supra*.

1. The fifth defense alleged that the Act is unconstitutional and void in that it delegates the Secretary legislative powers contrary to Article 1, Section 1, and Article 1, Section 8, Paragraph 18, of the Constitution of the United States; and that the Order promulgated therein is therefore void and unenforcible. Section 8c(18) and Section 10(c) contain invalid delegation of legislative power. The orders and regulations issued under them by the Secretary are prejudicial to the respondent.

2. The sixth defense and seventh defense assert that the Act is invalid as being in conflict with the anti-trust laws of the United States and of the State of Illinois. The Act in question contains no provision exempting persons who participate in the price fixing pool or trust created by the Act from the provisions of the anti-trust laws of the United States or of the State laws. In the absence of such provision exempting the producers and handlers of milk from complying with the Order, the handlers or producers would nevertheless be subject to prosecution under the Federal and State anti-trust laws.

3. The tenth defense alleges that said Order is unlawful, discriminatory, unreasonable, void and contrary to the Act in that the Secretary arbitrarily designated in Section 941.10 a certain "Chicago, Illinois Marketing Area" and arbitrarily omitted therefrom other cities, towns and villages marketing milk under the same and similar circumstances located in the same county and state adjoining said marketing area. The merit of respondent's contention was recognized by the Secretary of Agriculture in the amended

order promulgated by the Secretary, effective July 1, 1940, wherein the marketing area is enlarged to include the Village of Oak Park. The designation of the so-called Chicago, Illinois marketing area by the Secretary violates Section 8c(11)(B) of said Act, which, by its provisions, makes it a question of law for the courts to determine whether or not it, as promulgated by the Secretary, actually complied with the requirements of the Acts of Congress.

4. The eleventh defense sets forth that the Order is unenforcible, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of the policy of Congress, as set forth in Section 1 and Section 2 of said Act. Section 2 of said Act expressly provides that Congress authorized no action under said title contrary to the declaration policy of Congress. It is therefore the duty of the courts to determine whether the Order promulgated by the Secretary is in conformity with the declared policy of Congress and whether such action was in fact authorized by law.

5. The twelfth defense alleges that during the pendency of said cause the Secretary promulgated an amended order which neither suspended nor terminated Order No. 41, but repealed the same. The case now presents only a moot question.

ARGUMENT.

PART ONE.

I.

The intrastate distribution of products in competition with interstate commerce is not subject to federal regulation.

It is conceded that respondent purchased its total daily milk requirements from producers located entirely within the State of Illinois and processed the milk in its Chicago plant without interminglingit with any milk which had crossed the state lines, and sold and distributed the processed product solely within the State of Illinois. It is evident, therefore, that respondent was engaged in an intrastate business and was not in the current of interstate commerce. Nevertheless, petitioner contends that respondent is a handler within the meaning of and subject to the provisions of the Agricultural Marketing Agreement Act of 1937 and of the Order No. 41 on the ground that the product handled by respondent was *in competition* with interstate commerce and therefore subject to federal regulation.

In other words it is petitioner's contention that a commodity wholly intrastate in character and handling, *directly* burdens, obstructs or affects interstate commerce where the point of impingement of the intrastate transaction and the interstate transaction is *one of competition only.*

This contention presents a dangerous and revolutionary construction of the Commerce Clause of the Federal Constitution which would enable the Federal government to

control every enterprise, every occupation and every activity of the people merely by showing that the product thereof is in competition with similar products which cross state lines. Such a restriction would reach all enterprises and transactions which were in competition with those of other states. The authority of the Federal Government would embrace all activities of the people, and the authority of the State over its domestic affairs would exist only by sufferance of the Federal Government. There would be no limit to Federal power, and the States and the people would be effectively deprived of their rights theretofore reserved to themselves and guaranteed to them under Article X of the Amendments to the Constitution of the United States.[7]

The contention of petitioner, herein, is the result of wishful thinking of what power the Federal Government ought to have rather than what powers in fact have been given to it by the people. As was so aptly said by the Supreme Court in *United States* v. *Butler*, 297 U. S. 1, wherein certain provisions of the Agricultural Adjustment Act of 1933 were held to be in conflict with the Federal Constitution, at page 62:

> "The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. • • • *The question is not what power the federal Government ought to have but what powers in fact have been given by the people.* It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Con-

[7] *Schechter* v. *United States*, 295 U. S. 495, 546
Carter v. *Carter Coal Co.*, 298 U. S. 238.

stitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members." (Italics ours.)

We shall hereinafter show that petitioner's contention finds no support either in the provisions of the United States Constitution, the Acts of Congress or in the decisions of the Supreme Court of the United States.

A. The cases involving milk orders do not dispose of the constitutional and statutory questions raised for the first time by petitioner herein.

It is contended by petitioner that the identical question now urged was fully passed upon and considered in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533. An examination of the opinion in that case discloses that the question was not involved, and not even mooted. In that case suit was brought by the United States against a number of defendants seeking a mandatory injunction to compel them to comply with the provisions of the Order of the Secretary of Agriculture. The Commissioner of Agriculture and Market of the State of New York, intervened and sought an injunction commanding the defendants to comply with the Order issued pursuant to the New York State Laws in the event it should be determined that the milk was not subject to the Order of the Secretary of Agriculture of the United States. The Supreme Court, in discussing the Federal and State orders sought to be enforced, said at page 540:

"The two orders are in *pari materia*, one covering milk moving in or directly burdening, obstructing or affecting interstate commerce, and the other covering milk in intrastate commerce. *Each defendant is a dealer handling milk moving in interstate commerce.*" (Italics ours).

The Court further said at page 541:

"After a hearing, upon the merits the District Court dismissed the complaint. The State order was eliminated from consideration *on the understanding* not questioned here *that the milk of all four defendants is covered by the Federal order if valid.*" (Italics ours).

It is evident from the foregoing opinion that all the defendants by their own admissions and agreement entered of record, stipulated that they were subject to Federal control if said Act was valid.

Petitioner admits that the issue was not pressed in this court but contends that one of the defendants did challenge in the *lower court* the power of Congress to regulate it on the ground that its activities were entirely intrastate and that its milk was *usually* handled entirely intrastate. However, it is also admitted that the stipulation on which the case was tried showed that while the defendant's milk usually followed a route to New York City entirely within the State of New York, some of the tank trucks often passed through the State of New Jersey, en route to New York City, and that when tank trucks were not available the milk was shipped by rail on railroads running through the State of New Jersey.

The fact that pursuant to the stipulation of the parties, the State order was eliminated from consideration in this court, on appeal, clearly indicated that all of the defendants considered themselves subject to Federal control, if the order was valid.

This fact was fully recognized by the Supreme Court when it stated in its opinion, page 568:

> "There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce, nor is any question raised as to the power of Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sale of this milk as its marketing *is inextricably intermingled with and directly affects* the marketing in the area of the milk which moves across state lines." (Italics ours.)

It is evident from the foregoing that none of the defendants in that case in any wise challenged the fact that they were engaged in interstate commerce, nor did they raise any question as to the power of Congress to regulate the distribution in the area of wholly intrastate milk.

It further appears from the opinion that the intrastate milk referred to was *inextricably intermingled with milk which moved across state lines*, a fact which is not present in the case here under consideration.[8]

After careful examination of the opinion in *United States v. Rock Royal Co-operative, Inc.*, the United States Court

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[8] In the present case the court found that none of respondent's milk was physically intermingled with milk which had crossed state lines (R. 158) and that over 60% of the milk in the Chicago area was produced in Illinois, and the remaining milk sold in the Chicago marketing area was produced in Wisconsin, Indiana and Michigan (R. 158); whereas in the *Rock Royal* case two-thirds of the milk produced in the New York marketing area was found to have actually moved in interstate commerce and the remaining produced within the State of New York was physically and inextricably intermingled with the interstate milk. *U. S. v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 552-553.

of Appeals below held that this decision did not sustain petitioner's contention.[9]

Moreover the order promulgated by the Secretary of Agriculture under consideration in the *Rock Royal* case recognized that there was some milk entirely in intrastate commerce over which the Federal Government had no control and which was regulated by the order of the Commissioner of Agriculture and Market of the State of New York under State Laws and such intrastate handling of milk was expressly excepted from the order.

We submit that the *Rock Royal* case did not pass upon the question herein involved and that the expressions therein contained purporting to express a view upon the question here were not needful to the ascertainment to the questions between the parties and therefore *obiter dictum*. In the case of *Carroll* v. *Carroll*, 16 Howard (U. S.) 275, 14 L. Ed. 936, the Supreme Court said, in discussing the binding effect of an opinion rendered in a previous case, at p. 287:

> "To make it so, there must have been an application of the judicial mind to the precise question necessary

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[9] The Court said: "We are not convinced that the case sustains his position. The Supreme Court did not have before it the issue of the applicability of an order to a distributor whose activities were wholly intrastate. In that case the court said (p. 541): 'The state order was eliminated from consideration on the understanding, not questioned here, that the milk of all four defendants is covered by the Federal Order, if valid.' Further on in the opinion the court said (p. 568): 'There is no challenge to the fact that the milk of all four defendants reaches the marketing area through the channels of interstate commerce.' It is true that Mr. Justice Reed then said: 'Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk.' From this we believe the Supreme Court did not intend to preclude this important question, now before us, which was not an issue in the case before it." (R. 272).

> to be determined to fix the rights of the parties . . . and therefore this court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in questions between the parties."

In the case of *Cohens* v. *Virginia*, 6 Wheat. 399, 5 L. Ed. 257, when the case of *Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60, was very earnestly pressed upon the attention of the court, Mr. Chief Justice Marshall said:

> "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."[10]

It is contended by petitioner, that regardless of whether the court's remarks in the *Rock Royal* case were or were not *dictum*, the Circuit Court of Appeals, for the Second Circuit, in *United States* v. *Adler's Creamery, Inc.*, 107 Fed. (2d) 987, 110 Fed. (2d) 482, (certiorari denied 311 U. S. 657), had assumed that the *dictum* was not erroneous and correctly stated the law and had followed it.

However, the United States Circuit Court of Appeals, for the Seventh Circuit, in this case, after careful consid-

[10] To the same effect see *Williams* v. *U. S.*, 289 U. S. 553, 568.

eration of the *Adler's Creamery* case, refused to accept it as persuasive authority for petitioner's contention and pointed out that the court there relied upon the inopposite remark made in the *Rock Royal* case and *Currin* v. *Wallace*, 306 U. S. 1 and *Mulford* v. *Smith*, 307 U. S. 38, none of which supported petitioner's contention when applied to the respondent's activity in the case before this court (R. 27).

Petitioner also relies upon several decisions of District Judges, all of which, however, are easily distinguishable either upon the facts or the law.

In *U. S.* v. *Krechting*, 26 F. Supp. 266, the District Judge relied entirely upon *Nebbia* v. *New York*, 291 U. S. 502, to sustain his arbitrary finding that intrastate transactions involving milk necessarily affected and burdened interstate commerce. The Court entirely ignored the fact that the *Nebbia* case involved the right of a State under its police powers to legislate and did not involve the question of interstate commerce.[11] In this connection it may be noted that the Supreme Court has concurrently with the confirming opinion in the *Rock Royal* case sustained the power of the State to legislate in regard to the distribution of milk within the State.[12]

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[11] *Douglas* v. *Wallace*, 8 F. Supp. 379, 383

[12] In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 570, the Court said: "The power of a State to fix the price of milk has been adjudicated by this Court. • • • It belongs to that category of commodities that for many years has been subjected to a regulatory power of the State." See also *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, where the Court said (p. 351):

"Every State police statute necessarily will affect interstate commerce in some degree, but such statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

In *United States* v. *Andrews*, 26 F. Supp. 123, relied upon by the petitioners, it appeared that the defendants were handlers of milk in the Boston area, who either produced or purchased milk from other producers in Massachusetts, and who also bought from other handlers who had received milk from producers outside of Massachusetts, the milk so purchased being *co-mingled* with the local milk and processed at their respective plants in Massachusetts. In view of these facts, not found in the case here under consideration, the Judge there granted a temporary injunction.

In *United States* v. *H. B. Hood & Sons*, 26 F. Supp. 672, three (3) defendants were involved, two (2) of them purchased their milk outside of the State and the third one did both an interstate and intrastate business. It claimed exemption as to the intrastate character of its activities which the Court denied on the basis of *Currin* v. *Wallace*, 306 U. S. 1, and the *Shreveport* case, 234 U. S. 342. It is evident that these facts differ materially from those here under consideration.

In *United States* v. *Schwarz*, Civil Action No. 1480, Northern District of Illinois, Judge Barnes, without formal opinion, followed the *dictum* in the *Rock Royal* case. It does not appear from the opinion to what extent the particular defendant was engaged in interstate activities.

It is respectfully submitted that it is evident from the foregoing that the question herein urged by the petitioner has not been passed upon by the Supreme Court. We shall hereinafter show that the decision of the District Court and of the United States Circuit Court of Appeals was correct and in accordance with the United States Constitution, the Acts of Congress and the decisions of the Supreme Court of the United States.

B. Congress may not under the commerce clause regulate purely intrastate transactions where the point of impingement of the intrastate transactions upon interstate transactions is one of competition only.

Petitioner assumes from the finding of the District Court to the effect that respondent's milk is sold "in competition with milk of other handlers in the area," that it amounts to a finding that respondent is in some wise guilty of unfair or illegal conduct which necessarily results in great harm and injury to his competitors which requires regulation by the Federal Government. Petitioner imports a sinister meaning to the word "competition", having undoubtedly in mind cases involving unfair practices, monopolies, boycotts, and similar actions generally condemned by the courts. We submit, however, that the word "competition" used in the ordinary and accepted sense, does not involve any illegal, fraudulent or unfair practice. Competition in trade has at all times under the law in this country been considered as the life of commerce and been encouraged, as evidenced by the anti-trust laws and similar enactments.

In *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 544, the Court said:

> "The law does not visit with its reprobation a fair competition in trade; its tendency is rather to discourage monopolies, except where protected by statute, and to build up new enterprises from which the public is likely to derive a benefit. If one person can by superior energy, by more extensive advertising, by selling a better or more attractive article, outbid another in popular favor, he has a perfect right to do so, nor is this right impaired by an open declaration of his intention to compete with the other in the market."

The fact that by lawful competition a person may lose some of his customers, does not create a cause of action in his favor for damages or other relief. In *Citizens' Light, etc., Co.* v. *Montgomery Light, etc., Co.*, 171 Fed. 553, 560, the Court recognized the settled common law that a trader, in order to get another man's customers, could use any means not involving violation of the criminal laws or amounting to "fraud, duress or intimidation" as the law understands and applies those terms to transactions between man and man. The Court said:

> "So long as what he does is done to benefit his own trade, and, in taking over the customers of another, he keeps within the limitations heretofore defined, he is safe from legal restraint at the instance of a competitor in following 'the law of competition,' which takes little note of the ordinary rules of good neighborhood or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicited his customer, since the solicitor exercised a legal right in a legal way, and the exercise of a legal right in a legal way, for a lawful purpose, will not give a cause of action."

We agree with petitioner that we must assume that the District Court meant the word "competition" to have its ordinary significance and that it does not involve any intimation of illegality or unfair dealing on the part of the respondent herein, which is condemned by law.

Petitioner relies upon various affidavits in this case and exhibits offered at the hearing before the Secretary of Agriculture as tending to show that competition between handlers of intrastate and interstate milk is harmful. These affidavits and exhibits are based upon hearsay and abound in conclusions of law wholly unsupported by any competent

evidence. A motion to strike the affidavits was made by respondent in the Trial Court (R. 145-154) on that ground. The motion was partially heard and continued to a later date (R. 154). No formal order was entered thereon but presumably was considered by the court at the time petitioner's motion for summary judgment was denied.

Aside from the fact that there is no competent evidence in the record to support petitioner's contentions, we deem it unnecessary to enter into a discussion of economics, as it would not be material to the issues in this case. The question is whether Congress has the power under the commerce clause to regulate purely intrastate transactions solely on the ground that such intrastate transactions are in competition with interstate transactions or products thereof, *and not what power the Federal Government ought to have as a matter of convenience or necessity.*

In *United States* v. *Butler*, 297 U. S. 1, the Supreme Court said at p. 68:

> "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted.[13] The same proposition otherwise stated, is that powers not granted are prohibited. *None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.*

It is an established principle that the attainment of a prohibited end may not be accomplished under the

[13] "The Tenth Amendment declares: 'The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.' "

pretext of the exertion of powers which are granted. * * * Congress cannot render the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government."

While Congress was authorized by the commerce clause of the Constitution [14] to regulate commerce among the several states, it did not authorize Congress under the guise of regulating interstate commerce between states to reach all enterprises and transactions which could be said to have an *indirect* effect upon the interstate commerce.

In *Schechter* v. *United States*, 295 U. S. 495, 546, the Supreme Court said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn *only as individual cases arise*, but the distinction is clear in principle. * * * *But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power.* If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. As we said in the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352, 410, 57 L. Ed. 1511, 1546, 33 S. Ct. 729, 48 L. R. A.

[14] Sec. 8, Article 1, Constitution of the United States.

(N. S.) 1151, Ann. Cas. 1916A, 18: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.'" (Italics ours.)

Answering a similar argument of the Government in the *Schechter* case that if persons engaged in the poultry business in intrastate commerce were not made subject to the provisions of the Federal Code (N. R. A.), competition with those under the Code would suffer and that the cutting of prices would bring "about a demoralization of the price structure." The Supreme Court said at p. 549:

"Similar conditions may be adduced in relation to other businesses. *The argument of the Government proves too much.* If the Federal Government may determine the wages and hours of employes in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employes, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted

object of Federal control, the extent of the regulation of cost would be a question of discretion and not of power." (Italics ours.)

A study of the decided cases construing the commerce clause reveals nothing to support petitioner's contention that a finding of competition with interstate handlers was sufficient to subject respondent to the order promulgated under the Agricultural Marketing Agreement Act of 1937 herein. All the cases relied upon by petitioner disclose that particular intrastate transactions were held subject to federal control *only* because they had a *direct* effect on interstate commerce and were closely co-mingled with and directly related to interstate commerce under facts entirely dissimilar from those here involved.

In the *Shreveport* case, 234 U. S. 342, as in *Railroad Commission of Wisconsin* v. *C. B. & Q. R. Co.*, 257 U. S. 563, the Court merely held that in dealing with common carriers who were engaged in *both interstate and intrastate commerce*, and involving *the same trains* serving *interstate* as well as *intrastate* transportation, Congress has the right to control their intrastate operations in order to prevent unjust discrimination in rates.

In *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41, relied upon by the petitioner, the Court held that "In view of the actual interstate dealings in cash sales of grain on the exchange, and the effect of the conduct of the sales in futures upon interstate commerce, we find no difficulty • • • in concluding that the Chicago Board of Trade is engaged in a business affected with a public national interest, and is subject to national regulation as such."

In *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 542, also relied upon by petitioner, the Court fully supports the position of Respondent herein and the decision is fully discussed by the lower court in its opinion. (R. 273). An examination of the opinion in the *Schechter*

case will disclose that the Supreme Court has not only distinguished most of the cases relied upon by petitioner herein, but effectively disposed of all of the contentions made by petitioner under this point. *We deem it conclusive of this case.*

In *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, it appeared that the defendant received its raw materials in Pennsylvania from its subsidiary companies in other States, processed the raw materials in Pennsylvania and then transported them through its vast transportation facilities all over the country. The business of the defendant was likened to that of the stock yards in *Stafford* v. *Wallace*, 258 U. S. 495, and it was held that the activities of the defendant in effect constituted a stream or flow in interstate commerce which subjected the defendant to the *National Labor Relations Act*.

Currin v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38, and *United States* v. *Darby*, 312 U. S. 100, also relied upon by petitioner, were fully distinguished by the United States Circuit Court of Appeals in its opinion (R. 272-273).

We submit, therefore, that the judgment herein does not conflict with the decisions relied upon by petitioner herein, but merely conforms to the well settled constitutional limitations of the power of Congress over intrastate matters. The scope of the power of Congress to control interstate commerce must be considered in the light of our dual system of government.[15]

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[15] See *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 548, where the Court said at p. 548: "While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the Federal Power, and for all practical purposes we should have a completely centralized government."

Petitioner makes the claim that the existence of competition between interstate and intrastate commerce *such as in the case at bar*, has been regarded and treated as presenting the typical, as well as perhaps the simplest, situation to which the doctrine is applicable. In support thereof petitioner relies upon the *Shreveport* case, 234 U. S. 342, and the *Railroad Commission of Wisconsoin* v. *C. B. & Q. R. Co.*, case, 257 U. S. 563.

We submit there is no similarity between a railroad engaged *both* in interstate and intrastate business and that of the respondent herein, whose activities are entirely within the confines of one state. We believe the distinction is patent in view of the opinion in *Schechter* v. *United States*, 295 U. S. 495, 544, 556. Not regarding this fact, petitioner quotes an excerpt from the opinion in the *Schechter* case to prove that mere competition between domestic articles and those which crossed state lines, had a *direct* effect on interstate commerce, omitting, however, vital portions therefrom. The entire quotation is as follows, the portion omitted being shown by italics, page 546:

> "Direct effects are illustrated by the railroad cases we have cited as e. g., *the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, causing injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement*, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce."

With regard to the railroad cases referred to the court had previously said at p. 544:

> "We have held that, in dealing with common carriers engaged in *both interstate and intrastate commerce*, the dominant authority of Congress necessarily embraces the right to control their intrastate opera-

tions in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service." (Citing the *Shreveport* case and the *Railroad Commission* case relied on by petitioner.)

We submit that the competitive discrimination against interstate rates, as illustrated in the *Shreveport* case by a railroad engaged both in interstate and intrastate transportation, has no application whatsoever to a situation where a handler of milk buys all of his milk within a State and sells it within a State, and where none of his activities partake of an interstate character other than that his milk might be in competition with milk which crossed state lines. If petitioner's contention were correct, a local trucking company or interurban street car would be subject to federal regulation merely because they might compete with a railroad which was engaged in interstate commerce. There is hardly a single article produced or manufactured in common use which can be said not to be in competition with a similar article produced or manufactured across state lines.

Such transactions have only an *indirect* effect on interstate commerce. The quotation relied upon by petitioner from the dissenting opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329, must likewise be considered in connection with the facts in that case. It appears from the dissenting opinion that each of the complainants were engaged both *in interstate and intrastate commerce* and that the principal business of each defendant was in interstate commerce, and therefore subject to Federal control on the principle announced in the *Shreveport* case and cited in the dissenting opinion. Mr. Justice Car-

dozo, however, recognized that the principle announced had no application to purely intrastate transactions where it does not *directly* or *intimately* affect interstate commerce.

Petitioner also relies upon *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, wherein the Court refused to construe the provisions of the Federal Trade Commission Act to read, "*Unfair methods* of competition in (interstate) commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," because Congress had not so provided and the Courts could only enforce the law as written. Petitioner contends that the statute involved in the present case contains language omitted from the *Federal Trade Commission Act*. In the Federal Trade Commission Act Congress sought to regulate unfair methods of *competition* in interstate commerce, whereas in the Agricultural Marketing Agreement Act of 1937, Congress sought to regulate the price of certain commodities in interstate commerce. In the former, "unfair competition" was the gist of the evil sought to be regulated; in the latter, the matter of "competition" was definitely eliminated as a determining factor as to whether the commodities were to be regulated or not when Congress, as we shall hereinafter show, intentionally deleted from the Act the words "in competition with" and re-enacted the Act with those words omitted.

We submit that not a single case decided by this Court has been cited by petitioner herein which holds that only *one factual* element is essential to subject a milk distributor whose operations are wholly intrastate in character to the Order, namely a showing that such milk distributor *competes* with handlers operating in the market whose milk had crossed state lines. The reason none can be found is evident. *The Constitution forbids it.* As the United States Circuit Court of Appeals so aptly said in its opinion in this case —"to do so would be to subscribe to a view of causation

which, as Mr. Justice Cardozo said in the *Schechter* case, *supra* p. 554, 'would obliterate the distinction between what is national and what is local in the activities of commerce.' " (R. 274).

Any other construction would enable Congress to control all of the activities of commerce to the exclusion of the States, based upon a mere showing that the local activities were in competition with interstate commerce.

The fact that Congress can not under the Constitution control purely local activities, like that of respondent herein, does not mean, as contended by petitioner that there is a hiatus where neither state nor nation could effectively function.

In this connection, it may be noted that the Supreme Court has concurrently with the confirming opinion in the *Rock Royal* case sustained the power of the State to legislate in regard to the distribution of milk within the State, and this power is recognized by the Supreme Court in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 570, where the Court said:

> "The power of a State to fix the price of milk has been adjudicated by the Court. * * * It belongs to that category of commodities that for many years has been subjected to a regulatory power of the State." See *Nebbia* v. *New York*, 291 U. S. 502.

In *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752, the Supreme Court passed upon the validity of the Pennsylvania State law providing for the licensing and bonding of milk dealers and for the fixing of a minimum price to be paid to producers. The Court held that the Act as applied to a dealer operating a milk receiving plant within the State for shipments to points outside the State affected interstate commerce only inci-

dentally and, therefore, was not unconstitutional. The Court said (p. 351):

> "Every State police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of congressional power merely because it incidentally or indirectly involves or burdens interstate commerce."

It is evident from the foregoing that the Federal Government has complete jurisdiction over interstate matters, while the States have complete control over intrastate transactions. Each is sovereign within its respective sphere. Theoretically, there is no hiatus between the powers granted to the United States and those retained by the states and the people. This can easily be demonstrated as a matter of arithmetic by subtracting from the whole, originally belonging to the States and the people, those powers thereafter granted to the Federal Government by the Constitution. The fact that in problems of present day economy, it may be desirable to have unified action between the Federal Government and the States does not in any wise change or affect the respective rights of the United States or of the States and the people.

We shall hereinafter show that Congress clearly recognized that the State would control agricultural commodities involved in intrastate transactions, and in order to secure uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, it enacted Section 10 (i).[16]

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[16] This Section provides that the Secretary of Agriculture, upon request of the duly constituted authorities of any State, is directed, in order to effect the declared policy and in order to obtain uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricul-

In the Committee reports of both the House and the Senate it was expressly pointed out in connection with the proposed amendment Section 10 (i) that:

> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to *permit or require the Federal Government to invade the field of the States*, for the limitations of the act and the Constitution forbid regulation in that field, and this provision does not indicate the contrary * * *. Each sovereignty operates its own sphere. * * *" (R. 210). (Italics ours).

It will be seen that adequate facilities are provided by Congress for the full and complete cooperation between the States and the Secretary of Agriculture. If any State refuses to so cooperate, it is presumably by reason of the fact that the inhabitants of the State do not desire the State to do so for valid reasons, wholly sufficient to themselves. In such case it is evident that the Federal Government may not and should not invade the field of the States and impose upon the State and its citizens regulations against their will; any wishful thinking on the part of the Federal Government or its agencies to the contrary, notwithstanding.

C. Congress did not intend in passing the Agricultural Marketing Agreement Act of 1937, and prior Acts, to assume control of purely intrastate transactions and the Act itself contains no such provisions.

The brief history of the prior Acts which were incorporated to the Agricultural Marketing Agreement Act of 1937 and the interpretation and construction by the Courts of these Acts clearly sustains this position.

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tural commodities or products thereof to confer with and hold joint hearings with the duly constituted authorities of any State and is authorized to co-operate with such authorities and to issue complementary orders to orders or other regulations issued by such State authorities.

1. The Agricultural Adjustment Act of 1933 did not apply to transactions where the products were produced and sold within the same State (Title 7 U. S. C. A., Sec. 601, et seq.).

The Agricultural Adjustment Act of 1933, Sec. 608 (3) authorized the Secretary of Agriculture "to issue licenses permitting processors, associations of producers and others to engage in the handling *in the current of interstate or foreign commerce* of any agricultural commodity or product thereof *or any competing commodity or product thereof.*" (Italics ours.)

The Federal Courts, in construing said Act, uniformly held that a milk dealer purchasing all of his supply of milk in his state and selling all of said milk in said state was engaged in intrastate commerce and was not subject to the control of the Federal Government under said Act.[17]

On May 27, 1935, the Supreme Court unanimously rendered a decision in *Schechter* v. *United States*, 295 U. S. 495. In that case the court held that the slaughtering by wholesale poultry dealers of poultry shipped in the State and purchased by them from consignees, and the resale of the slaughtered poultry to retail dealers, are neither transactions in nor acts relating to interstate commerce so as to bring the regulation of hours and wages of employees of said wholesale dealers within the scope of the power conferred upon Congress by the Commerce Clause of the Federal Constitution.

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[17] *Douglas* v. *Wallace*, 8 F. Supp. 379, 381
United States v. *Greenwood Dairy Farms, Inc.*, 8 F. Supp. 398, 400
Royal Farms Dairy, Inc. v. *Wallace*, 8 F. Supp. 975 977, 979
Edgewater Dairy Company, Inc. v. *Wallace*, 7 F. Supp. 121, 122
Allen v. *Wallace*, 12 F. Supp. 515
Berdie v. *Kurtz*, 75 F. (2d) (C. C. A. 1935) 898.

The Supreme Court made a careful analysis of the decided cases and pointed out the distinction between direct and indirect effects upon interstate commerce and stated that the distinction of intrastate transactions upon interstate commerce held that the "distinction is clear in principle" and that it must be "recognized as a fundamental one essential to the maintenance of our constitutional system, otherwise * * * there would be virtually no limit to the federal power and for all practices we should have a completely centralized government."[18]

2. Congress, in 1935, in amending the Act of 1933, did not intend that the provisions shall apply to transactions where the products were produced and sold within the same State.

At the time the *Schechter* case was decided Congress was in session and immediately proceeded to amend the Agricultural Adjustment Act of 1933 to clarify doubtful legal provisions in view of the decision in the *Schechter* case. This is made evident by the report of the committee to the Senate on July 3, 1935, and the report of the committee to the House of Representatives on June 15, 1935 (R. 203, 204, 211) wherein it was stated that the amendments to the Agricultural Adjustment Act were needed in order to carry out two principal purposes, the second of which was "to insure that the program will be carried out within the limits of the powers given Congress under the Constitution." Both Senate and House reports provided, among other things:

> "The powers to be exercised under the proposed bill are confined within the limitations upon the Federal authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases. (R. 207-211) * * *"

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[18] 295 U. S. 546, 548

"The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce or to the handling thereof which directly burdens, obstructs or affects interstate or foreign commerce in such commodities or products thereof. Section 8 (2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof *'in competition with'* interstate or foreign commerce. This phrase has been *omitted* from the proposed section 8c (1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreement, *because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders* (R. 207-208)" • • • (Italics ours.)

It will be noted that Congress intentionally omitted the phrase "in competition with" interstate or foreign commerce from the Marketing Agreement Act of 1935 in order that the full extent of the Federal power over interstate and foreign commerce *and no more* be vested in the Secretary of Agriculture in connection with orders. In other words, it definitely appears that Congress, following the *Schechter* case, intentionally omitted the phrase "in competition with," contained in the prior Act, in order that no product merely "in competition with" products in interstate or foreign commerce be deemed to come within the purview of the Marketing Agreement Act of 1935. This Act was subsequently in 1937 re-enacted as a part of the Agricultural Marketing Agreement Act of 1937 without change.

It therefore definitely appears that the contention herein made by petitioner that the mere fact that the milk handled by the respondent was "in competition with" other milk which crossed State lines, and therefore was within the purview and subject to the regulations of the Marketing Agreement Act of 1935, is contrary to the express intent of Congress as evidenced by the wilful and intentional omission of the phrase in the re-enacted Act herein under consideration.

That this was the deliberate intent of Congress is further evidenced by the debates in the Senate wherein it appears that those in charge of the Bill in the Senate emphasized and reiterated that the Bill was not intended to control any phase of the milk situation where the milk is produced and where it is sold within the same State and was passed with that express understanding.

The following are some of the excerpts:

"Mr. Tydings: In order to bring the example before the Senate in a concrete way, let us suppose milk is produced in a State and sold within that State.

"Mr. LaFollette: My interpretation would be that that would not fall in the classification of moving in interstate commerce, or flowing in interstate commerce, or directly burdening or obstructing interstate commerce.

* * *

"Mr. Tydings: In my judgment, however, Mr. President, if milk originates in the same State where it is sold, it is intrastate commerce, and the Federal Government has nothing to do with that particular shipment of milk. The Senator from *South Carolina* (*Mr. Smith*) and the Senator from Nebraska (Mr. Norris) and the Senator from Idaho (Mr. Borah), as well as I, all agreed the other day that *this was an interstate*

provision only, and I do not think that construction can be too greatly accentuated in this discussion, so that the Federal agency charged with administering this provision will not attempt to regulate intrastate shipments, when such shipments are not within the purview of the law.

"Mr. Borah: Mr. President, the language on page 10 'as directly burdens, obstructs, or affects interstate or foreign commerce,' is purely surplusage. It does not add anything whatever to the power of control by the Congress. It may be, that language having been used, that someone may assume it gives an additional control over intrastate commerce; but the court would have to determine for itself in each particular case whether intrastate commerce did directly affect or directly burden interstate commerce. In other words, the language herein, in my opinion, adds nothing whatever to the power of Congress.

* * *

"Mr. Tydings: I agree completely to what the Senator from Idaho has said. My only reason for restating the proposition is that if the Federal agency charged with the administration of this provision were to serve notice upon a producer of milk that the Federal Government had jurisdiction, the producer might be frightened into the belief that if he did not carry out the Government's order he might be fined or put in jail, or that something else might be done to him; *and I want it known by this debate, reiterated over and over again, that if the Congress passes this proposed act it is presumed that those who are charged with its administration will not, in the case of an intrastate shipment of milk, attempt to issue Federal orders and thereby cause producers to be put to the expense of hiring lawyers to prove that the Federal Government*

has no right to do the thing which it is attempting to do.

* * *

"Mr. Tydings: I may say to the Senator from Iowa that even if intrastate milk did become co-mingled with interstate milk, insofar as the man who produced and sold in the same State is concerned, that would not affect his situation. But here is the point: As we all know, the twilight zone, which the Senator from Wisconsin just described, offers an opportunity for the Federal Administrators to issue orders to State shippers and producers of milk where the whole transaction is within a State, which will force them to go to law in order not to be bound in cases by the Federal decree. *I want it distinctly understood that it is the sense of the Senate that those in charge of the administration of this provision will have no* right to issue orders which will take over the government or control or the price-fixing or any other phase of the milk situation where the milk is produced and where it is sold always within the same State.

"Mr. Dickinson: The very purpose of the 'weasel' words to which the Senator from Idaho has just referred is to do the very thing the Senator from Maryland has said should not be done.

"Mr. Tydings: I quite agree with the Senator, but I want it made clear *that the Senate does not interpret the provision in that way.* Insofar as I know, *no Senator upon this floor claims that the Federal Government has anything to do with milk which is produced and which* the proposed act will be enforced. * * *" (R. 215, 216). (Italics ours.)

Committee reports and explanatory statements of members in charge made in presenting the Bill for passage

may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 433, 475, 65 L. Ed. 349, 360.

Here, like in the *Duplex Printing Press Co.* case, it definitely appears that Mr. Smith, who submitted the committee report to the Senate and who had the bill in charge, had definitely agreed with the leading Senators that the Act was not intended to cover a situation where milk is produced in the State and sold within that State; that not a single Senator claimed otherwise; and that it was the sense of the Senate that the Government would have no right or control of any phase of the milk situation where the milk is produced and where it is sold within the same State. This was reiterated over and over again so that the real purpose could not be contortioned into a meaning which might authorize those in charge of the administration of the Act to include an intrastate handling of milk. This was the final word of the Senate on the subject and, borrowing the language from the opinion in the *Duplex Printing Press Company* case, 254 U. S. 443, 475

> "was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported. In substantially that form, it became law, and since, in our opinion, its proper construction is entirely in accord with its purpose, as thus declared little need be added."

Petitioner in its brief calls attention to the fact that in the course of the debates in the Senate some of the Senators had expressed an opinion that under certain conditions intrastate commerce might be subject to the provisions of the Act, namely where it *directly* affects interstate com-

merce or where an interstate commodity was *so intermingled* with the intrastate commodities that it could not be separated and where no line of demarcation could be formulated.[19]

We respectfully submit that nothing said in that connection in any wise detracts from the unequivocal statement apparently fully agreed to by all the Senators to the effect that the Federal Government would have nothing to do with milk which is produced and which is sold in the same State, without which the Senate would not have passed the amendments. The question of intermingling intrastate with interstate milk so discussed is in no wise applicable to the case here under consideration since the problem of intermingling intrastate milk with milk which crossed state lines is not present in this case.

The debates in the House of Representatives were not offered in evidence. Petitioner, however, refers to a colloquy had by two of the Representatives in Congress wherein Representative Andresen was of the opinion that it would be a legal question as to whether or not milk that is sold by a farmer in Illinois to a handler within a marketing area would come within the provisions of the Act.[20]

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[19] 79 Congressional Record, 1135-1139.

[20] However, when asked by Mr. Halleck, "Do I understand that under the proposed amendment the issuance of orders is limited solely to interstate commerce?" Mr. Andresen said: "Absolutely; it does not affect intrastate commerce. If the gentleman is asked when he gets back home by his grocery merchant who sells milk, butter and cheese, whether or not the merchant has to take out a license, he may tell him 'no' he does not have to take out a license and does not become subject to the federal license issued by the Secretary of Agriculture. The same thing would apply to the small *milk dealer* or a farmer who has a small herd of cattle and *sells* milk to the people in the cities and villages *in the district*. He would not be subject to a license because the license provisions or order provisions deal only with the commodities that move in interstate commerce." 79 Congressional Record, 9479. (Italics ours).

In view of the committee report of the House of Representatives, which was identical with that of the report of the committee of the Senate (R. 203, 204, 211), it was evidently the intention of the House of Representatives to limit the scope of the Act and of the orders promulgated thereunder to the limitations upon the federal authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case. The opinion in the *Schechter* case was deemed so important that it was by unanimous consent inserted in the Congressional Record[21] and thereby became the yardstick to be used in connection with the interpretation of said Act.

3. The provisions of the Agricultural Adjustment Act of 1935 do not apply to transactions where the products were produced and sold in the same State.

An examination of the provisions of the Act clearly shows that its provisions have no application to the respondent, who is admittedly engaged solely in intrastate business. The mere fact that the products respondent handles may be in competition with like products which cross State lines does not make it subject to the Act.

In Section 8b of said Act, relating to Marketing Agreements, it is expressly provided that the Secretary shall have power to enter into marketing agreements with processors, producers and others engaged in the handling of any agricultural commodity or product thereof *only* with respect to such handling as is in the current of interstate or foreign commerce, or which *directly* burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof.

In Section 8c(1), the Secretary of Agriculture is authorized, subject to the provisions of said section, to issue and amend orders, and it is expressly provided that:

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[21] 79 Congressional Record, p. 8245.

"such orders shall regulate in the manner hereinafter in this section provided *only* such handling of such agricultural commodity or product thereof as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof."

We submit that Congress, by the use of the word "only" in the foregoing sections, clearly emphasized its determination that the Secretary of Agriculture was limited in the making of marketing agreements or issuing orders to such handling of products which actually were in the current of interstate or foreign commerce, or which *directly* burdened, obstructed or affected interstate or foreign commerce, but did not authorize the Secretary of Agriculture to interfere with or exercise any jurisdiction over purely intrastate matters.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, the Supreme Court, in an extensive opinion, reviews the entire history of decisions involved in the interpretation of the so-called Commerce Clause of the Constitution. The Court held that the fact that the commodities purchased and manufactured within the State are intended to be sold or transported outside the State did not render their production or manufacture subject to Federal regulation under the Commerce Clause.

The Court there held that the fact the commodities purchased or manufactured within a State, are intended to be sold or transported outside the State did not render their production or manufacture subject to Federal regulation under the Commerce Clause. Quoting from *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, 67 L. Ed. 237, 243, the Court said:

"To hold otherwise 'would nationalize all industries, it would nationalize and withdraw from state jurisdic-

tion and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.' "

In discussing the contention of the Government that the production and distribution of bituminous coal bears upon and directly affects interstate commerce, and that regulation thereof is imperative for the protection of such commerce, the Supreme Court said, page 307:

"That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, *as the 'preamble' recites*, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* Case, *supra*, pp. 546 *et seq.* * * *

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. * * * Such effect

as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character. * * *

"The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins." (Italics ours.)

4. The Marketing Agreement Act of 1937 re-enacted all the provisions of the Agricultural Adjustment Act of 1933 and 1935, and its provisions do not apply to transactions where the product was produced and sold within the same State.

It is evident from the foregoing that it was the settled law in 1937 that the Commerce Clause could not be construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, and that the effect must be a *direct* effect upon interstate commerce before the Federal government may take jurisdiction.

In 1937 Congress reenacted and amended certain provisions of the Agricultural Adjustment Act (Act of May 12, 1933, 48 Stat. at L. 31, Chap. 25, as amended Aug. 24, 1935, 49 Stat. at L. 750, Chap. 641, 7 U. S. C. A., Sec. 602). All of the sections pertaining to interstate commerce were reenacted.

Sections 4 and 5 of the Agricultural Marketing Agreement Act of 1937 expressly approves and legalizes all marketing agreement, license, order or regulation under the Agricultural Adjustment Act, or any amendment thereof, and further provides that except for the processing taxes or compensating taxes, which were omitted by the Act of 1937, nothing in said Act was to be construed as affecting the

provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in Section 1. Said Section 1 has no application to the interstate commerce question.

Section 10(j), defining interstate or foreign commerce, was added to the Act of 1935.[22]

Said section clearly follows the *Schechter* and the *Carter* cases as to what constitutes "interstate commerce" and does not in any wise attempt to change the settled law. It is evident that the milk purchased by the defendant from farmers in the State of Illinois and which is sold within the State of Illinois does not come within the statutory definition of what constitutes interstate or foreign commerce. The petitioner herein admits that the respondent was engaged purely in an intrastate transaction, and it is not claimed that the milk handled by the respondent is in

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[22] "10(j) The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word 'State' includes Territory, the District of Columbia, possession of the United States and foreign nations."

the current of interstate commerce or that it is in any wise commingled with milk which has crossed State lines. We find nothing in the definition which in any wise supports petitioner's theory that merely because respondent's milk is in *competition* with other milk which had crossed State lines, respondent was engaged or in any wise interfered with or obstructed interstate commerce. Congress still retained the provision in the Act that its provisions shall apply *only* to the handling of agricultural commodities as is in the current of interstate or foreign commerce or which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodity.

We have shown that Congress in enacting the Agricultural Marketing Agreement Act of 1937 and re-enacting the provisions of prior Acts never intended that the Act should include a situation like the one here under consideration where a handler of milk purchases all of its milk from farmers in the State of Illinois and, without in any wise commingling the same with others, sells it entirely within the State of Illinois, although in competition with other milk which may have crossed State lines.

We have also shown that the provisions of the Act expressly limit the Secretary of Agriculture to the promulgation of orders to the regulation of such handlers *only* who are in the current of interstate or foreign commerce, or which directly burden, obstruct or affect interstate or foreign commerce in such commodity, and that under the *Schechter* case and other cases handling of milk by the defendant did not directly affect interstate commerce.

5: The business of an intrastate handler of milk under the Marketing Agreement Act of 1937 does not directly affect interstate commerce merely because his product competes with interstate handlers.

We have shown that Congress expressly amended the law to avoid such construction by omitting the phrase "in competition with."

Where a revised statute, or one enacted for another, *omits* provisions contained in the original Act, the parts omitted cannot be kept in force *by construction* but are annulled. In *United States* v. *Stroop*, 109 F. (2nd) 891 (C. C. A. Ohio, (1940)), the Court said (p. 893):

> "The Congress must be presumed to know the language employed in former acts and the judicial construction placed upon them, and if in subsequent legislation on the same subject, different language is used, there is a presumption of a manifest intention to change the law. *Johnson* v. *United States*, 225 U. S. 406, 416, 56 L. Ed. 1142."

To the same effect, see *United States* v. *Board of Commissioners*, 26 F. Supp. 270, 274; *Stewart* v. *Kahn*, 78 U. S. 493; 20 L. Ed. 176, 178.

It follows that the Courts must, in order to give effect to the declared intent of Congress, construe the Act to mean that mere *competition* by an intrastate handler with similar products crossing State lines does not subject the handler to Federal regulation.

We contend that in view of the settled law so ably set forth in the *Schechter case*, 295 U. S. 531, which Congress, as shown by the House and Senate reports, intended to follow, and which was reiterated in the *Carter* case, 298 U. S. 238, Congress had no power to control all local enterprises under the pretext that it had an indirect effect

on interstate commerce merely because one was in competition with the other or that prices of the products in the industry might be affected.

This is the crux of this case and was aptly summed up by the United States Court of Appeals in its opinion in the case below when it said: (R. 273)

> "In *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 520, 548, the unreversed findings of the Circuit Court of Appeals, 76 F. (2) 617-618, were that 96% of the chickens involved under the particular code came from interstate commerce to be disposed of in New York; that the practice sought to be regulated not only demoralized the business in New York, but had national repercussions affecting and controlling the prices received by those engaged in interstate commerce. Under such circumstances the court held that the effect upon interstate commerce was only an indirect one and not sufficient to permit Congressional regulation. The effect upon commerce in the case now before us is no more direct than in the *Schechter* case. The only substantial difference is that in the present case none of the defendant's milk was ever in interstate commerce. The milk's only possible relation to interstate commerce was with some thirty-odd per cent of the milk in the area which had been brought into the state, processed, and then sold in competition with defendant's." (Italics ours.)

Had Congress intended that mere competition with interstate products shall subject a purely intrastate enterprise to Federal regulation, it could and would have said so in plain, unmistakable terms and not purposely omitted the same by a later amendment.

Not having done so, the Courts cannot legislate for Congress and read into the law something which Congress itself

did not include and as a matter of fact expressly intended to exclude.

In *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 85 L. Ed. 531 [1941], affirming the United States Circuit Court of Appeals of this Circuit, said (p. 534):

> "This case presents the narrow question of what Congress *did, not what it could do.* And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished." (Italics ours.)

The maxim, *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another, is clearly applicable. Congress having specified that only such handling of agricultural commodities which *directly* burdens, obstructs or affects interstate or foreign commerce in such commodity shall be subject to the provisions of the Act, it follows that competition with interstate products which are *indirect* burdens or obstructions on interstate or foreign commerce as intended by Congress shall not be subject to the Act.[23]

Any construction as herein contended for by petitioner will definitely preclude the State of its jurisdiction in intrastate affairs entirely upon the pretext that the local transactions in some way, no matter how infinitesimal, or merely by being in competition with like products crossing State lines, affected interstate commerce and therefore were entirely within the control of the Federal government under the Interstate Commerce Clause.

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[23] *Arthur* v. *Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438.

We submit that such a construction would do violence to the Constitution—violence to the express intent of Congress—violence to the express language used in the Act of Congress, and would constitute an usurpation by the Courts of the legislative branch of the government by construction which in effect is new legislation.

6. The finding of the Secretary that all milk which was produced for sale in the marketing area is handled in the current of interstate commerce, or so as directly to burden, obstruct or affect interstate commerce, is not authorized by law, contrary to the fact, and of no legal effect.

Petitioner contended that the Secretary's finding contained in Sec. 941.0(1) of the order brings the respondent's business within the regulatory scope of the order.

As heretofore shown, Congress itself has made no such finding in the Act. If anything, in view of the history of the Act and the express intent of Congress, such interpretation of the law is clearly prohibited.

No authority to make such finding was delegated to the Secretary by the Act. Hence such finding is of no legal effect.

As was so aptly said in *Douglas* v. *Wallace*, 8 F. Supp. 379, 383:

> "The mere statement or finding either by Congress, the Secretary of Agriculture, or the Administrator, that the production and sale of milk in the Oklahoma City area is a burden upon interstate commerce, is not only not conclusive, but is not justified by the facts. To conclude that such transactions constitute interestate commerce is equivalent to the conclusion that all commerce is interstate."

Even if the Congress had specifically authorized the Secretary to make such finding, which it did not, such

finding would not be conclusive because the question is clearly one for final judicial determination.

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 51;

Royal Farms Dairy, Inc. v. *Wallace*, 8 F. Supp. 975, 977.

Even if the Act itself had recited that competition of intrastate commodities with interstate products shall be deemed to have a direct effect on interstate commerce, nevertheless such recital would not be conclusive upon the courts.[24]

The cases relied upon by the petitioner in support of its contention are easily distinguishable from the case here under consideration, firstly, because Congress itself made no such finding in the Act nor delegated such authority to the Secretary, and secondly, the facts in each of the cases differ materially from those here involved. Here the relation of the subject to interstate commerce and its effect upon it, as heretofore shown, are clearly nonexistent.

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[24] In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Act, there considered, in its preamble recited that direct effect upon interstate commerce, but the court did not feel bound thereby and made its own finding saying (p. 307)

> "* * * and we are brought to the final and decisive inquiry, whether here that effect is direct, *as the 'preamble'* recites, or indirect."

II.

Petitioner is precluded from urging that the Court had no jurisdiction to issue an injunction against the United States, having failed to urge this point in the lower courts. The injunction was nevertheless properly granted.

It is contended by petitioner that the District Court had no jurisdiction to issue an injunction against the United States. This question was only incidentally mentioned by petitioner in a foot-note to its petition for a writ of *certiorari* (p. 2) under the heading "Question Presented", but was not specifically mentioned or argued either in the District Court[25] or in the United States Court of Appeals.[26]

A question not urged in the lower court or in the Circuit Court of Appeals will not be considered by the Supreme Court.

Adams v. *Mills*, 286 U. S. 397, 416, 417.
Zellerbach Paper Company v. *Helvering*, 293 U. S. 172, 182.
Sonzinsky v. *United States*, 300 U. S. 506, 514.

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[25] See argument of counsel for petitioner (R. 161-163) and argument of counsel for respondent (R. 195-197) on motion to dismiss counterclaim.

[26] Petitioner, in its brief (p. 23) in the United States Court of Appeals, urged the following as the contested issues: (a) Whether plaintiff was entitled to summary judgment on its motion under Rule 56 of the Federal Rules of Civil Procedure; (b) Whether the plaintiff was entitled to judgment in its favor on the final hearing; (c) Whether the District Court committed prejudicial error in striking defendant's fourth to eleventh defenses, inclusive. The question, now for the first time urged, was not suggested or argued in the brief and the United States Court of Appeals was not asked and did not pass upon the question of jurisdiction.

Should this Court nevertheless consider the proposition, we submit that the District Court had the right to grant an injunction.

Jurisdiction of suits against the United States is granted by the Tucker Act of March 3, 1887, as amended, 28 U. S. C. A. 41 (20).[27]

While the action was brought by the petitioner in the name of United States of America, the fact is that it was instituted on behalf of and at the request of the Secretary of Agriculture of the United States.[28] The object of the counterclaim was to restrain the Secretary of Agriculture and governmental agencies from enforcing Order No. 41 against the respondent, which, it was alleged, was illegal and contrary to the law and did not apply to the defendant, the enforcement of which would result in great and irreparable damage to the respondent in compelling it to comply with said order and paying sums of money to

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[27] Said Tucker Act provides "that the district courts shall have original jurisdiction as follows":

> Twentieth. Concurrent with the Court of Claims of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admirality, if the United States were suable, *and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the* Government of the United States against any claimant, *against the Government in said court* . . ." (Italics ours.)

[28] See complaint (R. 2).

others who were not legally entitled thereto (R. 100). Under such circumstances injunction is a proper remedy.

Panama Ref. Co. v. *Ryan*, 293 U. S. 388, 433.
Waite v. *Macy*, 246 U. S. 606, 610.
Philadelphia Company v. *Stimson*, 223 U. S. 605, 622.
Colorado v. *Toll*, 268 U. S. 228, 230.
Lane v. *Watts*, 234 U. S. 525, 540.

The procedure adopted by the respondent in this case in filing a counterclaim conforms to a practice commonly used in similar cases for many years.[29]

The cases relied upon by petitioner to the effect that "a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim",[30] have no application to the cause herein under consideration.

In the *Shaw* case it was held that the United States, by filing a claim against an estate in a State Court, did not subject itself in accordance with the local statutory

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[29] For example, there were many cases instituted under the Agricultural Adjustment Act of 1933 wherein both plaintiff and the defendant, under counterclaims, sought injunctions against each other, and injunctions were granted in favor of the party opposing the United States, and the injunctions on behalf of the United States were denied.

United States v. *Greenwood Dairy Farms*, 8 F. Supp. 398.
Royal Farms Dairy Company v. *Wallace*, 8 F. Supp. 975.
Edgewater Dairy v. *Wallace*, 7 F. Supp. 121.
Columbus Milk Producers v. *Wallace*, 8 F. Supp. 1014.

[30] *United States* v. *Shaw*, 309 U. S. 495.
United States v. *The Thekla*, 266 U. S. 328.
Nassau Smelting & Refining Works v. *United States*, 266 U. S. 101.

practice to a counterclaim or set-off, there being no provision in the law authorizing such procedure. The Court, in its opinion, however calls attention to the fact that under the Tucker Act the claims against the United States may be sued upon in the Court of Claims or the District Court.[31]

In the *Nassau Smelting & Refining Works* case relied upon by petitioner, the Court merely held that since the defendant's claims were based exclusively on the Dent Act,[32] the counterclaim was improper and could not be asserted in the District Court as the Tucker Act did not apply since the Dent Act conferred exclusive jurisdiction upon the Court of Claims.

Rule 13(d) of the Federal Rules of Civil Procedure expressly provides for the assertion of counterclaims against the United States, or an officer or agency thereof, where authorized by law.

We submit that the District Court had jurisdiction to entertain the counterclaim.

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[31] 309 U. S. 501.

[32] March 2, 1919, Chap. 94, (40 Stat. at L. 1272).

PART TWO.

I.

The District Court erred in finding contrary to the law and the evidence that the Order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred.

It is fundamental that any order issued by the Secretary of Agriculture must conform to the provisions of the Act and all conditions precedent to the effectiveness of said order must have occurred.

The Supreme Court, in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 598, states the proposition concisely as follows:

> "The question is simply whether the statute was followed."

We shall show that the Secretary of Agriculture not only failed to comply with conditions precedent to the effectiveness of said order but that the order as promulgated is contrary to the express provisions of the Act.

1. The Secretary of Agriculture did not give due notice of and opportunity for a hearing upon Order No. 41, herein sought to be enforced.

The Act expressly requires the Secretary of Agriculture to give due notice of and an opportunity for a hearing upon

a particular proposed order and this requirement is made a condition precedent to the effectiveness of an order.[33]

The respondent introduced at the hearing of said cause respondent's exhibits 1, 2, 3 and 4, which are admitted by the petitioner to constitute *all* of the evidence upon which the Secretary of Agriculture made his findings and fixed the terms and provisions containing the order (Appellant's Br. below, p. 21; Tr. 201).

An examination of respondent's exhibits 1, 2, 3 and 4 discloses that the Secretary of Agriculture gave notice of a public hearing on June 9, 1939 regarding the proposed marketing agreement and order regulating the

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[33] Section 8c(3) of the Agricultural Marketing Agreement Act of 1937 provides: "* * * he *shall give due notice of and an opportunity for a hearing upon a proposed order.*"

Section 8c(4) provides: "*After such notice and opportunity for hearing,* the Secretary of Agriculture shall issue an order, if he *find* and *sets forth in such order,* upon the evidence introduced *at such hearing* (*in addition to such other findings as may be specifically required by this section*) *that* * * *."

Section 8c(9) provides: "Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers * * * to sign a marketing agreement relating to such commodity or product thereof, *on which a hearing has been held,* the Secretary of Agriculture, with the approval of the President, determines: * * *."

Section 8c(10) provides: "*No order shall be issued* under this section *unless* it regulates the handling of the commodity or product covered thereby in the same manner as and is made applicable *only to persons* in the respective classes in the industrial or commercial activity specified in, a marketing agreement *upon which a hearing has been held.*"

Section 8c(17) requires "that notice of a hearing upon a proposed amendment to any order issued pursuant to Section 8c, *given not less than three days* prior to the date fixed for such hearing, shall be deemed notice thereof." (Italics ours.)

handling of milk in the so-called "Chicago, Illinois Marketing Area", *prepared and proposed by the Pure Milk Association and the Chicago Milk Producers Council, Inc.* This proposed marketing agreement and order provided that the so-called "Chicago, Illinois Marketing Area" was to include all that territory lying within the limits of Chicago, Illinois and all that territory lying within the boundaries of Cook County, Du Page County, State of Illinois, and townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort, and Crete, in Will County, in the State of Illinois, and the townships of St. John, Ross, North Calumet, and Hobart, in Lake County, in the State of Indiana (Appendix, p. i).[34]

A public hearing was held on June 26, 1939 pursuant to a notice issued by the Secretary of Agriculture "on the marketing agreement and order prepared and proposed by said Pure Milk Association and the Chicago Milk Producers, Inc." (Defts.' Ex. 3, pp. 3, 5). All of the evidence taken at the hearing was with respect to the proposed marketing agreement and the proposed Chicago marketing area as therein defined (Defts.' Exs. 1, 2, 3 and 4).

No action was taken by the Secretary of Agriculture with respect to the proposed marketing agreement of the Pure Milk Association and the Chicago Milk Producers' Council, Inc.

On August 18, 1939 the Secretary of Agriculture tentatively approved *another* marketing agreement regulating the handling of milk in a different so-called "Chicago, Illinois Marketing Area" (R. 63) containing substantially the same provisions as Order No. 41 involved herein (R.

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[34] Excerpts of respondent's exhibits 1, 2, 3 and 4 are set forth in an appendix to this brief.

64-76), but *differing* materially in substance from that proposed and on which hearings were had (Appendix, p. i-x).

The Chicago, Illinois marketing area in Order No. 41 covers only the territory within the corporate limits only of the cities of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe, State of Illinois (R. 11).

Other material differences appear such as in the Definition of Producers and Handlers (contrary to Section 8c(10) (supra)), Reports of Handlers, Classification of Milk, Minimum Prices, Sales Outside the Marketing Area, Application of Provisions, Determination of Uniform Prices to Producers, Payment for Milk, Expenses of Administration, and many other provisions contained in the one are omitted in the other. (Compare Order No. 41 (R. 8-22) and proposed marketing agreement prepared by Pure Milk Association, et al) (Appendix, p. i-x).

No hearing was had with respect to the tentatively approved marketing agreement. No notice or opportunity for a hearing was given by the Secretary of Agriculture to the producers or handlers of the product.

The tentative marketing agreement, or Order No. 41, was not submitted to the handlers engaged in the City of Chicago for signature. Only certain of the producers were thereupon requested by the Secretary's representative to participate in the referendum, and Order No. 41 was thereafter issued by the Secretary of Agriculture (R. 221, 228).

It is evident from the foregoing that a hearing was had upon the proposed marketing agreement prepared by the Pure Milk Association and the Chicago Milk Producers Council, Inc., but not upon the tentatively approved marketing agreement and proposed order submitted to the producers in referendum (Appendix i, Tr. 63-67).

A comparison of the marketing agreement upon which a hearing has been held, and the marketing agreement submitted to the producers in referendum, as incorporated in Order No. 41, discloses such a diversity of provisions that it cannot be said that the hearing upon the former was also a hearing upon the latter. We have already adverted to the material differences in the so-called "Chicago marketing area" and in the proposed plan and Order No. 41. The producers involved in the so-called "Chicago, Illinois Marketing Area" under the plan, on which a hearing was had, included not only the City of Chicago, but all of the territory lying within the boundaries of Cook County and Du Page County, in the State of Illinois, various townships in Will County, and various townships in the State of Indiana.

The testimony introduced at the hearing was in reference to this proposed "Chicago, Illinois Marketing Area" and involved numerous producers and handlers of milk in no wise affected by Order No. 41. The facts involved in determining the desirability of creating a marketing agreement with reference to the so-called "Chicago Marketing Area", as defined in Order No. 41, differed materially from the facts involved in the proposed plan submitted by the Pure Milk Association, *et al.* upon which no hearing was had.

The producers and handlers of milk and the public had no opportunity to be heard on the new and wholly different order promulgated by the Secretary. The Act clearly contemplates that a hearing must be held before any order issued pursuant to the Act shall become effective (Sec. 8c(9)).

Petitioner admits that the proposal on which the hearing was held, the tentatively approved marketing agreement and the order differed, but that the general scheme or the manner of regulation is the same in each, in that

"each provides minimum classified prices which handlers are required to pay for milk purchased from producers, and each provides for distributing the returns from the classified prices to all producers through a market-wide equalization pool, and that the proposal, the marketing agreement and the order are all applicable to persons engaged in precisely the same class of industrial or commercial activity, *i. e.*, the handling of milk."

While this statement is correct as far as it goes, the fallacy thereof is apparent.

Every order promulgated by the Secretary of Agriculture under the Act, whether in New York, Boston, Omaha or Duluth, can be said to embody the same general scheme or manner of regulation. Yet, it can hardly be contended that a hearing held upon a proposed marketing agreement or order covering for example the New York area, could be considered as in compliance with the Act by the Secretary in the promulgation of an order embodying the general scheme and applicable to handlers of milk, but designating a new and different marketing area in another city, such as Chicago or elsewhere, under entirely different circumstances, terms and conditions.

The differences between the proposed marketing agreement and order as issued, are not trivial or immaterial, as petitioner seeks this court now to believe. No one will contend that the questions involved in determining the necessity or advisability of creating a marketing area covering two entire counties and thirteen townships located in other counties in the States of Illinois and Indiana, are the same as are involved in determining the desirability of creating a marketing area within the confines of the City of Chicago and several adjoining cities and villages, all located in a part of one county in Illinois.

Producers and handlers notified to appear on the hearing of the proposed marketing agreement had the right

to assume that the questions involved and to be considered at the hearing, would be those which concerned the proposed plan of marketing as therein defined and set forth. All of the evidence introduced at this hearing contemplated the consideration of an economic problem in which producers selling milk and handlers disposing of milk in both Illinois and Indiana were interested. An entirely different problem, however, was for the first time presented when the Secretary of Agriculture submitted to certain producers only, for referendum, his newly conceived tentative order which changed the marketing area and materially altered the definitions of producers and handlers and other provisions of the proposed marketing agreement. He thereby altered not only the number and classification of people which would have been affected under the original plan and the economic problems involved, but also created new controversial questions not theretofore in any wise in issue or considered at the prior hearing.

We submit that there actually was no hearing upon the proposed order of the Secretary of Agriculture submitted to some of the producers in referendum.

Under Section 8c(4), the Secretary of Agriculture was authorized to issue an order if he finds from the evidence introduced at such hearing that the issuance of such order will tend to effectuate the declared policy of the Act with respect to such commodity. Since the evidence introduced at the hearing pertained to an entirely different plan, it follows that the Secretary of Agriculture had no authority to issue an order upon which no evidence was introduced and which was not even under consideration when the hearings were held.

We therefore submit that the order never became effective because the conditions precedent to its effectiveness never occurred.

2. Order No. 41 never became legally effective because the required approval of producers was never properly secured.

Section 8c(9) of said Act expressly provides:

> "Any order issued pursuant to this section shall *become effective in the event that*, the Secretary of Agriculture, with the approval of the President, determines: * * * B. * * * is approved or favored.
>
> (i) By at least two-thirds of the producers * * *"

Section 8c(19) of the Act provides:

> "For the purpose of ascertaining whether the issuance of an order is approved or favored by producers *as required under the applicable provisions of this title*, the Secretary may conduct a referendum among producers. The *requirements* of approval or favor under any such provision *shall be held to be complied* with *if*, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring *is equal to or in excess* of the percentage *required under such provisions.* * * *". (Italics ours.)

Petitioner contended that the Secretary's determination as to producers' approval of an order is a matter of executive judgment and discretion which cannot be controlled or set aside by the Courts.

We submit that the provisions of Section 8c(19) clearly contradict petitioner's contention. Had Congress intended to leave the matter entirely to the discretion of the Secretary, there would have been no occasion for Section 8c(19).

Said section expressly provides that the approval of the producers is "required" under the applicable provi-

sions of said title, and speaks of the approval or favor as a "r rement" which shall be *held to be complied* with *if* the percentage approving or favoring is equal to or in excess of the percentage "required under such provision".

If the matter was left to the discretion of the Secretary, it would not be "required" or be a "requirement" of the law.

The fact that Section 8c(19) is silent on the effect of an unfavorable vote does not leave the Secretary free under such circumstances to make his determination in the exercise of his judgment or discretion. It is only if the percentage approving or favoring is equal to or in excess of the percentage required under the provisions of the Act that the requirements "shall be held to be complied with", and since under Section 8c(9) the order can only "become effective in the event that" at least two-thirds of the producers approve or favor the order, it necessarily follows that if less than the required percentage is not in its favor, the order *never becomes effective* under the Act.

Under Section 8c(19) there is no room for the exercise of judgment or discretion. The requirements of the Act are either met, or not, depending upon the vote. The determination of the Secretary amounts to nothing but the announcement of the vote as he finds it. The law certainly does not contemplate that the Secretary could, after an adverse vote, falsely determine that the order was approved or favored by at least two-thirds of the producers, when such was not the fact.

As a matter of fact, the Supreme Court, in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 597, considered the validity of the referendum as conducted by the Secretary of Agriculture and carefully examined the evidence

submitted as to which of the producers were entitled to vote in the referendum and which were not. The Court said, in that connection, that it was a question of whether the statute was followed. It is evident therefore that the Supreme Court considered the vote of the producers as a condition precedent to the effectiveness of said order and that the determination of the Secretary was not arbitrary and subject to the exercise of his judgment and discretion.

We respectfully contend that the uncontradicted evidence herein shows that the referendum conducted by the Secretary of Agricutlure was not a referendum of all of the producers, as required under Sections 8c(9) and 8c(19) of said Act.

(a) The Order is void on its face in failing to comply with Sections 8c(4) and 8c(9) of said Act.

A determination by the Secretary, which is made a condition precedent to the effectiveness of the order, must, by reason of the positive provisions in Sections 8c(4) and 8c(9) of the Act, be *contained* and *recited* in the order.

In this case, the Secretary recited in the order that over 67% of the producers voting in a referedum had approved or favored the order (R. 9), but does not recite that all producers entitled to vote were given notice of the referendum. This requirement must be set forth and cannot be supplied by implication. *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388, 432.

This is not a finding that more than two-thirds of the producers who, during such representative period, had been engaged in the production of such commodity for sale in the marketing area, approved or favored the order. For aught it appears on the face of the order, only a small percentage of the producers entitled to vote in the referendum might have participated therein. 67%

of the number voting favored or approved the order, and yet, said 67% of those voting may actually constitute but a small percentage of the total number of producers who were entitled to vote in said referendum.

The determination and finding of the Secretary of Agriculture, which must be set forth in the order under Section 8c(4) does not appear in the Order, and said Order is therefore unenforceable and void.

(b) Order No. 41 was illegal in that all of the producers entitled to participate in the referendum under the Act were not notified nor permitted to participate therein.

From Section 8c(9), it definitely appears that the producers referred to are *all the producers*, without exception or limitation of any kind.

From the finding of the Secretary in Order No. 41, it appears that a referendum was sought to be had of the producers who were engaged in the production of milk for sale in the Chicago, Illinois Marketing Area (R. 9, 10).

This, we contend, required that *all* producers who, during the representative period, were engaged in the production of milk for sale in the Chicago, Illinois Marketing Area, should be permitted and given an opportunity to cast their ballot in the referendum for the purpose of approving or disapproving said order.

The uncontradicted evidence, however, shows that *all* producers were not requested to participate in the referendum on the tentatively proposed marketing agreement or order.

In his affidavit, Mr. Connor, Referendum Agent designated by the Secretary of Agriculture to conduct the producer referendum, stated that the producers, who were requested to participate and who were notified to cast their ballot, were taken from a list prepared from the

records of the various health authorities in the area (R. 115).

Mr. Krueger, Chief Sanitary Officer of the Board of the City of Chicago, a witness for the petitioner, testified at the trial that the list, prepared by him and furnished to the petitioner, of producers furnishing milk in the City of Chicago, *did not include producers who furnished milk in Chicago in the form of fluid milk, or as cream, or as concentrate or evaporated or similar products for manufacturing purposes;* that up to a few months before the trial, such milk was not considered to be under the supervision of the health authorities, but since then, by reason of a ruling of the Corporation Counsel of the City of Chicago, the Board of Health did control such producers (R. 220-221).

It will be noted that tremendous amounts of milk and milk products were sold in the Chicago, area, in the City of Chicago proper, which were not under city inspection and the plants of which producers were not under government inspection. It follows that the list of the producers who furnished milk under the ordinance, secured from the public authorities, could not and did not cover all the producers who furnished milk and milk products in the Chicago area.

Section 941.4 of Order No. 41 shows that the order intends to control all milk and all milk products, not only those that were covered by ordinance of the City of Chicago (see Milk Ordinance of the City of Chicago, Chap. 154, Mun. Code, Sept. 29, 1939), but also cottage cheese and "all milk used to produce milk products" (R. 13-14).

Yet, the producers of *cheese* and *all other milk products* were not given an opportunity and had no voice in the referendum.

Section 941.4 of said order includes all milk disposed of in the form of fluid milk, regardless of whether such milk is used for purposes for which no approval by health authorities in the marketing area is necessary.

Yet, such producers whose plants were not subject to approval by health authorities, but who furnished milk in the area, and ostensibly were subject to its provisions, were not given an opportunity and had no voice in the referendum.

In July 1940, the Secretary of Agriculture promulgated an amended order and specifically omitted from the amended order fluid milk, which is used for purposes for which no approval by health authorities is necessary (R. 127). However, handlers are compelled to account for milk received from producers producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, all or a portion of which milk is disposed of as Class I milk or Class II milk in the marketing area (R. 122-123).

This indicates the scope and construction of Order No. 41 which was amplified in the amended order of July 1940.

Petitioner admits that all producers who are engaged in the production of fluid milk are affected by the order and were entitled to participate in the referendum. It is, however, contended that producers who furnished milk in Chicago in the form of fluid milk for manufacture into cheese, butter, etc., were not entitled to participate in the referendum, although the farmers could not tell when they brought their milk into the Chicago area whether it would be sold by the handlers as milk or cream or used for manufacturing purposes. In support of their position, petitioner relies upon *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 597-599.

An examination of the opinion, however, does not sustain this position, but on the contrary, fully supports respondent's contentions herein. Petitioner points out that the objection made in the *Hood* case by a large number of southern and western producers who delivered milk to stations shipping cream to the Boston market was that they should have been permitted to vote and that the Court pointed out that such producers were not engaged in the production of milk for shipment into the marketing area in fluid form and were therefore properly excluded from the referendum. The basis of the exclusion was the fact that these producers were located outside the Boston milk shed and did not produce any part of the burdensome surplus of fluid milk.

Petitioner argues, *a fortiori*, the exclusion in this case of producers engaged in producing milk for manufacture into cheese, butter, etc., was entirely proper. The fact, however, is that the Supreme Court in the *Hood* case held otherwise. The court said at p. 599:

> "There was no error in permitting the remaining groups of producers to vote. That some handlers to whom voting producers delivered milk shipped only cream during the representative period is immaterial. The farmers, it was found, cannot tell when they bring in their milk whether it will be sold by the handlers as milk or cream. As these handlers could have sent the fluid milk to the area, and in most instances did, at times other than the representative period, the milk delivered to them was a potential part of the surplus. The producers who lacked certificates of registration were properly included. Their milk was sold in the area by licensed handlers."

Under the uncontradicted facts in this case no notice was given to producers who furnished milk in Chicago in

the form of fluid milk for manufacturing purposes (R. 220, 221).

It follows therefore that while it may be true that more than 67% of the producers who *voted* in the referendum approved or favored the order, yet all of the producers in the Chicago milk-shed, who were *entitled* to vote in said referendum, *did not vote* or *cast a ballot*, thereby rendering the referendum illegal.

3. The Order is contrary to the express provisions of Section 8c(5)(G) of the Act, and other provisions thereof, and therefore void.

Section 941.1(a)(3) defines the term "producer" as any person who produces milk which is received by a handler at a plant *which is approved by any health authority* for the receiving of milk for sale in the marketing area, or who produces milk which upon proof furnished satisfactory to the Market Administrator is *qualified* to be received at such plant.

As heretofore pointed out, the Act in question in reference to producers clearly intended to include all of the producers who were engaged in the production of milk for sale in the so-called "Chicago, Illinois Marketing Area" (Sec. 8c(9)).

It is submitted that the Act of Congress does not permit nor authorize the Secretary of Agriculture, or the Market Administrator, to confine the operation of the Act to only such producers as can meet the arbitrary requirement of some health authority wholly disconnected with the Federal government or its agencies, or some Market Administrator appointed by the Secretary of Agriculture, and violates Section 608c(5)(G) reading as follows:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall pro-

hibit or in any manner limit in the case of the products of milk the marketing in that area of any milk or product thereof produced in any production area in the United States."

Said order is void in that there is no definite method or means or standard provided for determining when any health authority shall approve the plant of any producer for the receiving of milk for sale in the marketing area, or what proof will be deemed satisfactory to the Market Administrator as to qualify such milk at such plant; and said order illegally delegates legislative authority to the Market Administrator.[35]

The foregoing defense is included in the denial contained in the Second Defense of respondent's answer, and is also included in respondent's Eighth Defense (R. 84, 94).

4. The Order is contrary to the express provisions of Sections 2 and 8e of the Act of Congress and therefore void.

This defense is specifically set forth in the Fourth Defense of respondent's answer (R. 89), and is also included in the denial contained in the Second Defense of respondent's answer, wherein it is denied that the order was issued by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said order have occurred.

In Section 2 of the Act, it is expressly declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing condi-

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[35] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 92.
Cline v. *Frink Dairy Co.*, 274 U. S. 445, 463.
Champlin Refining Co. v. *Commission*, 286 U. S. 210, 243.
Parks v. *Libby-Owens-Ford Glass Co.*, 360 Ill. 130, 140.

tions for agricultural commodities *in interstate commerce*, as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; * * * The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929.

"(2) *To protect the interest of the consumer* by * * * (b) *authorizing no action* under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish *in subsection (1) of this section.*" (Italics ours.)

It follows that any order promulgated by the Secretary of Agriculture in violation of this section is not authorized by law and is clearly void.

Under Section 8e it is provided that if the Secretary *finds and proclaims* that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919-July 1929, or all that portion thereof for which the Secretary *finds and proclaims* that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

It will be noted that under this section, the Secretary of Agriculture is required to *find in the order* that the pur-

chasing power, during the base period specified for such commodity in Section 2, cannot be satisfactorily determined from available statistics of the Department of Agriculture, and if he does so, he may then use the postwar period, August 1919-July 1929.

This finding must be set forth in the order as being one of the findings specifically required in addition to those specified in Section 8c(4).

It is not sufficient, as contended by petitioner herein, to issue a separate proclamation in a separate document instead of including it in his order.

Section 8c(4) expressly provides that the Secretary of Agriculture must find and set forth "in such order", "in addition to such other findings as may be specifically required *by this section*".

Since Section 8c is clearly *a part of Section 8*, we cannot understand petitioner's contention that that section "refers only to findings required by Section 8c of the Act and not Section 8e".

Petitioner also urges that it has been the consistent administrative practice to issue separate proclamations as to the base period in connection with marketing agreements and orders, and that no court has disapproved the practice. Suffice it to say that this question has never been called to the attention of the court and has never been passed upon or approved by the courts.

It is contended by petitioner that the opinion in the *Hood* case reveals that a similar proclamation with respect to the base period was issued separately from and at least eleven days before the issuance of the order there involved, 307 U. S. 592. The opinion, however, does not disclose that the order did not also embody a finding and proclamation, as required by Section 8c(4); *neither was the point*

here involved in any wise mooted or passed upon by that court.

While the order recites that the Secretary has found and proclaimed the period August 1919-July 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois Marketing Area (R. 10), we find no finding, as required by Section 8c(4) and Section 8e, that the purchasing power during the base period specified for milk in Section 2 of said Act cannot be satisfactorily determined from vital statistics of the Department of Agriculture.

We submit that the order is void for this reason.

Where a finding a fact of an administrative officer or department is prerequisite to the making of a rule or order, the finding must be explicitly set out and a failure so to do is a fatal defect.

Panama Ref. Co. v. *Ryan*, 293 U. S. 388
United States v. *C. M. P. & P. R. Co.*, 294 U. S. 499
Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 202
Florida v. *United States*, 282 U. S. 194, 215[36]

[36] In the *Panama* case *supra*, the court said, (293 U. S. 432) quoting from *Wichita R. & Light Co.* v. *Public Utlities Commission*, 260 U. S. 48, 59:

"In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an

As heretofore shown, Congress had definitely designated in Section 2(1), *supra*, the pre-war period as the base period in all agricultural commodities other than tobacco and potatoes. Presumably, at the time the law was enacted, the prices received by farmers for these commodities were carefully considered and deemed adequate. This is evidenced by the fact that only as to two agricultural commodities an exception was made. Presumably, the law would not have been passed unless the consumer was protected against high and exorbitant prices which might be paid to the farmers under marketing agreements or orders promulgated under said Act, to the detriment of the consumer. Hence, the positive prohibition against any action which might injure the consumer.

The requirement on the part of the Secretary to make a finding and proclamation only in the event that statistics are not available in the Department of Agriculture so that the purchasing power during the base period could not be satisfactorily determined, is a material and not a mere technical requirement.

Sections 2 and 8c do not vest any discretion in the Secretary to adopt one *or* the other base periods. The objection to the constitutionality of the Act that delegated certain legislative powers to the Secretary was resolved in favor of the Government by the Supreme Court in the case of *United States* v. *Rock Royal Corporation*,

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express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this." Referring to the ruling in the *Wichita R. & Light Co.* Case, the Court said in *Mahler* v. *Ebby*, 264 U. S. 32, 44, 68 L. ed. 549, 556, 44 S. Ct. 283:

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

307 U. S. 553, because the court held the Secretary's duties were specific and his discretion circumscribed by definite formulae.

As a matter of fact, the uncontradicted evidence shows that the Secretary had the necessary data in his possession and that he in fact offered the same in evidence at the hearing on the then proposed order.[37]

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[37] In defendant's Exhibit 1 appears a statement concerning the Chicago Milk Market and the proposed marketing agreement and order prepared by L. K. Wallace, Agricultural Economist, and P. L. Miller, Principal Agricultural Economist, United States Department of Agriculture, Division of Market and Marketing Agreements, Dairy Section, June 1939, which was offered in evidence as United States Department of Agriculture Exhibit No. "2." As a part thereof the following tables were offered in evidence and are set forth in the appendix hereto attached, pp. xiii to xix.

Table 1, showing index numbers, prices paid by farmers for commodities bought in 1910 to 1939, compiled from Reports of the Bureau of Agricultural Economics; (App. xiii).

Table 4—Prices paid producers per hundredweight of milk, Chicago, Illinois, 1909-1933; (App. xiv).

Table 5—Dealers buying prices of 3.5% milk per hundredweight, Chicago, Illinois 70 mile zone, and Milwaukee, Kenosha, Racine, South Bend and Rockford, f.o.b. city, 1919-1938, compiled from Reports of the Bureau of Agricultural Economics; (App. xv).

Table 6—Table showing milk, whole, wholesale prices per hundredweight received by farmers in Illinois 1909-1939, compiled from Reports of the Bureau of Agricultural Economics; (App. xvi).

Table 7—Milk, whole, wholesale price per hundredweight, received by farmers in Indiana 1909-1939; compiled from Reports of the Bureau of Agricultural Economics; (App. xvii).

Table 8—Milk, whole, wholesale prices per hundredweight received by farmers in Wisconsin 1909-1939, compiled from Reports of the Bureau of Agricultural Economics; (App. xviii).

Table 9—Milk, whole, wholesale prices per hundredweight received by farmers in Michigan 1909-1939, compiled from Reports of the Bureau of Agricultural Economics (App. xix).

It is contended by petitioner, however, that the prices specified in the Tables offered in evidence by the Government at the hearing, are not on a classified use basis and are not satisfactory statistics for computing the purchasing power of milk to be sold on a classified use basis.

We submit the point is without merit. The classified use basis under Section 8(c)5 is to determine what each of the *handlers* should pay, subject to adjustments, depending on the form or the purpose of use.

The price to the farmer is the same in any event. Hence the prices paid to the farmers during the pre-war period, as shown by the Tables, offered in evidence by the Secretary of Agriculture, are satisfactory from every standpoint for computing the purchasing power of milk, wholly unaffected by its subsequent use.

As a matter of fact, the Secretary actually used available statistics in the Department of Agriculture to determine the purchasing power of milk when he determined to use the pre-war period as the base in another milk marketing agreement in effect in the Chicago marketing area.

Under Section 941.5 of Order No. 41, it is provided that the minimum price for Class 1 milk shall be computed pursuant to the formula, as set forth in Section 1 of Article 6 of the Marketing Agreement for Evaporated Milk issued by the Secretary on May 31, 1935 (R. 15).

Thus this particular marketing agreement by reference is part and parcel of Order No. 41. In said Marketing Agreement for Evaporated Milk of May 31, 1935, the Secretary of Agriculture finds that it is necessary to fix minimum prices to be paid to producers that will approach a point "where the milk produced by such producers has a purchasing power more nearly equivalent to the purchasing power of such milk of August 1909-July 1914."

By these findings the Secretary admits that he has sufficient statistics bearing on the purchasing power of milk during the pre-war base period, August 1909-July 1914, in and for the State of Illinois, which includes the Chicago marketing area.

We submit that in view of this uncontradicted evidence, it affirmatively appearing that the Department of Agriculture *had the necessary statistics in its possession*, and in view of the total absence of *any finding in the order* that the Department of Agriculture did not have available statistics, as required by the Act, *the order must be held to be invalid as not in compliance with the positive requirements of the Act.*

It is further contended by petitioner that the finding of the Secretary of Agriculture that his department did not have available statistics which were satisfactory, was a determination wherein he exercised administrative discretion which was final and could not be reviewed by the courts.

The Supreme Court of the United States, however, has held otherwise. In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52, the Court aptly said:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

We submit that the authorities relied upon by petitioner have no application to the facts and the law in this case. Under Sub-Section (2)b of Section 2, Congress expressly declared that in order to protect the interest of the consumer it *authorized no action* under this title which has for its purpose the maintenance of prices to farmers above the level which is declared to be the policy of Congress in Sub-Section 1, namely that the base period shall be the pre-war period.

While Section 8e amends Section 2 in permitting the Secretary to use the post-war period as the basis upon the conditions therein set forth, nevertheless it must be borne in mind that Congress, by Sub-Section 2 of Section 2 for the protection of the consumer, did not authorize any act on the part of the Secretary of Agriculture which has for its purpose the maintenance of prices to farmers above the level set forth in Sub-Section 1 of Section 2. It therefore becomes a question of law to determine whether the prices fixed by the Secretary of Agriculture based upon the post-war period were in fact authorized by Congress and in compliance with the Act.

Table 4 (appendix xiv) shows that the farmer received during the pre-war period, August 1909 to July 1914, considerably less than in the post-war period. It is evident, therefore, that by the use of the post-war period in the order here under consideration, the farmer was enabled to secure and does secure a higher price than he would have received had the pre-war period base been used, as provided in Sub-Section 1 of Section 2 of the Act.

The failure of the Secretary of Agriculture to adhere to the statutory and legal formula, punishes respondent, if the Act be held legal, to pay a minimum price for milk vastly in excess of the pre-war price and *the consumer*, of course, likewise is compelled to pay more for the product than the law contemplated.

The finding of the Secretary of Agriculture that the purchasing power during the pre-war base period could not be satisfactorily determined from available statistics is not conclusive but is subject to review by the courts in order to determine whether the action has in fact been authorized by Congress in view of the limitation contained in Sub-Section 2 of Section 2 of the Act.

In *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 595, the Supreme Court said:

> "*Ordinarily the base period of section 2 is to be used. It is only after a finding* that the purchasing power of the commodity during the period fixed in section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, that the Secretary, by Section 8c, is authorized *to find* and *proclaim* the postwar period." (Italics ours.)

In that case, it was contended that an amendment to an order required the finding and proclamation by the Secretary as to the absence of statistics for the pre-war period available for use, which amendment, however, did not attempt to change the base period.

The Court said (p. 596):

> "There would seem to be no occasion to review the absence of satisfactory statistics, however, on a proposed amendment which does not involve any change in the base period."

We submit that the Supreme Court recognized the Court's right to review the absence or existence of satisfactory statistics and whether the Secretary complied with the requirements of the statute in his finding and proclamation.

We submit that in the absence of a showing and proper finding by the Secretary that the statistics are not available as required by Section 8(e) the order is void and is not authorized by and contrary to Section 2 of said Act.

II.

The District Court committed prejudicial error in striking respondent's fourth to eleventh defenses, both inclusive.

1. The Fourth Defense.

This defense (R. 89-91) was discussed under Part Two, point 4, (*supra*).

2. The Fifth Defense.

The Fifth Defense (R. 91-92) alleges that the Act is unconstitutional and void in that it delegates to the Secretary legislative powers contrary to Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States, and that Order No. 41 promulgated thereunder is therefore void and unenforceable.

By Section 8c(18) of said Act, Congress delegated to the Secretary of Agriculture authority to fix such prices to producers of milk as he finds in his opinion will reflect the price of feeds, the available supply of feeds, and other market conditions which affect market supply and demand for milk and its products in the marketing area, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and "*thereafter, as the Secretary finds necessary* on account of changed circumstances, *he shall*, after due notice and opportunity for hearing, *make adjustments in such prices.*"

We submit that this power is practically *without limitation* and may be in utter disregard of the express dec-

laration of the policy to Congress as expressed in Section 2 of said Act and without regard to the interests of the handler of the product and of the consumer, and authorizes the Secretary to fix high and exorbitant prices of milk to farmers and compel handlers of milk to pay said high and exorbitant prices irrespective of the base period mentioned and provided for in said Acts.

By Section 10c of said Act, Congress delegated to the Secretary of Agriculture *unlimited authority*, with the approval of the President, to make such regulation with the force and effect of law as may be necessary to carry out the powers vested in him by said title, and provided that any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

Petitioner relies upon *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 557, 574, as having decided this question adversely to respondent's contention.

While a majority of the Court did discuss the method of fixing minimum prices in the first instance by the Secretary of Agriculture under paragraph 8c(18) and found that this did not constitute an unlawful delegation of authority to the Secretary of Agriculture, and a vigorous dissenting opinion by three of the Justices was to the contrary, nevertheless it will appear that the points raised herein as constituting an unlawful delegation of authority to the Secretary of Agriculture were neither discussed nor passed upon by the Supreme Court. An examination of the Act will disclose that in the first instance the Secretary of Agriculture was given the power to fix prices according to certain requirements which the majority of the Supreme Court held were sufficient to sustain its validity, but nothing was said with regard to the *broad and unlimited provisions* permitting the Secretary "there-

after" to make adjustments in such prices practically without limitation.

The Act expressly provides that the original order must be "upon the basis of the evidence adduced at the hearing," but the Secretary is not bound by any such limitation as to subsequent changes in the order.

Neither did the Supreme Court pass upon the validity of paragraph 10c of the Act—the unlimited authority with the approval of the President to make such regulation *with the force and effect of law* as he may deem necessary to carry out the powers vested in him by said title and to impose penalties for the violation thereof.

Petitioner relies upon *United States* v. *Grimaud*, 220 U. S. 506, in support of its contention that "the authority to make regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title is valid."

We submit, however, that the *Grimaud* case does not support its contention in that the penalties imposed for violation of the administrative regulations was in that case imposed by Congress itself and was not delegated to the Secretary of Agriculture, as in this case. In this case the Secretary was delegated the authority to make regulations *with the force and effect of law* and allowed the Secretary to prescribe penalties according to his own errant will and discretion.

This, the Supreme Court in the *Grimaud* case said, could not be done. The court there pointed out that Congress cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of facts upon which the law makes or intends to make its own action depend: "That the Secretary of Agriculture could not make rules and regulations for any and every purpose."

Citing *Williamson* v. *United States*, 207 U. S. 462, the court further points out with reference to the act there under consideration that "a violation of reasonable rules regulating the use and occupancy of the property is made a crime *not by the Secretary* but by Congress. *The statute, not the Secretary*, fixes the penalty."

It is evident from the foregoing that the court would have held the provisions void had Congress delegated to the Secretary of Agriculture the right to make regulations with the force and effect of law and to prescribe penalties therefor, since the penalties in such case would be made by the Secretary and not by Congress, and the regulations would fix the penalty and not the statute.

We submit that the language of the dissenting opinion in the case of *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 582, is particularly true and applicable to the points raised by this respondent *and not passed upon by the Supreme Court*, wherein it is said:

> "A cursory examination of the statute shows clearly enough the design to allow a Secretary to prescribe according to *his own errant will* and then to execute. *This is not governed by law but by caprice. Whimseys may displace deliberate action* by chosen representatives and become rules of comment. To us the outcome seems wholly incompatible with the system under which we are supposed to live." (Italics ours.)

It is however urged by petitioner that it does not appear that any orders or regulations issued under Sections 8c(8) and 10(c) have been in any way prejudicial to respondent and that respondent therefore has no standing to question their constitutionality. It is admitted that the Secretary did amend Order 41, under Section 8c(18), during the pendency of the action, which will affect respondent's rights, if same be deemed valid.

Under Section 10c the Secretary promulgated regulations and penalties which it is claimed respondent failed to comply with, and for which a mandatory injunction is being sought by the petitioner.

We submit that respondent is vitally concerned as to whether he is subject to the amended Order now in effect and whether he is subject to the regulations and penalties imposed by the Secretary under the Act.

3. The Sixth Defense.

The Sixth Defense (R. 92) asserts that the Act is invalid as being in conflict with the anti-trust laws of the United States in that said order creates, fosters and provides for an unlawful monopoly, pool, trust, combination and confederation among producers and handlers of milk who participate therein to regulate and fix the price of milk to farmers; that said order is expressly contrary to the provisions of Sections 1 and 2 of an Act of Congress of July 2nd, 1879, c 647, 26 Stat. 209 (15 U.S.C.A. Commerce and Trade) and Section 13 (15 U.S.C.A.), and other Acts of Congress, being some of the antitrust laws enacted by Congress, that the enforcement of said order against this respondent would subject this respondent to criminal prosecution under Federal laws prohibiting engaging in any such combination or conspiracy for the purpose of fixing prices of commodities, and that said Order No. 41 is therefore illegal and void.

There are two methods whereby orders may become effective under the Act: Under Section 8c(8) an order may become effective if more than fifty per cent of the handlers of the commodity have consented to the marketing agreement and such order is approved by two-thirds of the producers; or, under Section 8c(9), in cases where more than fifty per cent of the handlers have refused to

sign a marketing agreement and two-thirds of the producers approve thereof.

It will be noted that in each case the effectiveness of the order depends upon the agreement by more than two-thirds of the producers to the price fixing arrangement provided in said order, which may or may not be consented to by the handlers. The agreement among the producers is clearly the establishment of a monopoly or combination or confederacy for fixing the price of a commodity within the Sherman Anti-Trust Act, *without which agreement the order under the Act can never become effective.*

We submit that the proceedings herein are an effort by the Secretary of Agriculture to compel the respondent, *who is engaged purely in intrastate business, and therefore subject to State control,* to participate in this illegal pool or combination which, under the Sherman Anti-Trust Act, would make the respondent a participant and subject to its penalties. While the Act contains provisions exempting marketing agreements, Section 8(b) and Section 3(d) of the Act, such provisions do not apply to orders and, therefore, no such exemption exists with regard to Order No. 41.

Whenever Congress entered the field of price fixing, it has in the past inserted a provision in the respective Acts exempting persons who participate therein from the provisions of the antitrust laws of the United States. This was true in the case of *National Industrial Recovery Act,* June 16, 1933 (Title 15 U.S.C.A. Sec. 701) the *Bituminous Coal Act,* April 26, 1937, Title 15, Sec. 832 (d), the *Motor Carrier Act,* of 1935, as amended, Title 49, Sec. 313(f), and others. These provisions apply to orders issued by the governmental agency as well as to voluntary agreements entered into pursuant to such acts. The Supreme Court has heretofore pointed out that the penalties of the

Sherman Act could not be evaded except by the method adopted by Congress by proper enactments alleviating the penalties of the Sherman Act through approval by designated public representatives. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 227.

We submit that in the absence of some such provision exempting the producers and handlers of milk from complying with the order, the handlers would nevertheless be subject to Federal prosecution under the antitrust laws and the knowledge and acquiescence of the Federal Government would be no defense thereto.[38]

4. The Seventh Defense.

This defense (R. 93) presents the same question as applied to the State Anti-Trust Laws of Illinois as the one discussed under the Sixth Defense (Part Two, point II, 3, *supra*), and the argument there made is equally applicable. The fact that respondent is engaged entirely in intrastate business and therefore subject to local State control emphasizes the importance of our contention. Congress could have inserted an exemption both as against "State or Federal" antitrust laws, as it did in the *Motor Carrier Act*, but did not see fit to do so.

The Courts cannot legislate for Congress and supply a provision presumably intentionally omitted by Congress.

5. The Eighth and Ninth Defenses.

These defenses (R. 94-96) have been argued under Part Two, point I, 2 and 3, *supra*.

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[38] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. And see footnote 60 appended to this opinion in 84 L. Ed. p. 1170.

6. The Tenth Defense.

This defense (R. 97), alleges that said order is unlawful, discriminatory, unreasonable, void and contrary to the Act in that the Secretary arbitrarily designated in Sec. 941.1(1) of said order the cities, towns and villages of Chicago, Evanston, Wilmette, Kenilworth and Glencoe as the "Chicago, Illinois Marketing Area," and arbitrarily omitted from said marketing area other cities, towns and villages marketing milk under the same or similar circumstances and located in the same County and State adjoining the City of Chicago, or in its vicinity, such as Oak Park, Berwyn, Cicero, and others.

It was alleged in the Tenth Defense of respondent's answer that the prices which handlers are compelled to pay producers under Order No. 41 are considerably higher than handlers pay producers for said commodity for sale other than in said marketing area designated by said Order No. 41 in cities, towns and villages in the immediate vicinity of Chicago and said marketing area, such as Oak Park, and others; that handlers of milk engaged in the Chicago, Illinois Marketing Area, who are compelled to comply with Order No. 41, would be discriminated against and be unable to compete with unregulated milk in other adjoining areas under the same or similar conditions, and thereby be deprived of their constitutional rights to engage in their lawful occupation in the State of Illinois except at great loss and irreparable damage.

The merit in respondent's contention was recognized by the Secretary of Agriculture in the order promulgated by the Secretary, effective July 1st, 1940, wherein the marketing area is enlarged to include the village of Oak Park. (See Sec. 941.1(a)(1) of said order, as amended, (R. 122).)

In view of the express provisions contained in Section 8c(11)B of said Act, providing that the marketing area in the case of milk and its products shall not be the smallest regional production area or regional marketing area, or both, this question is taken out of the realm of administrative policies over which the Secretary of Agriculture has exclusive jurisdiction, but makes it a question of law for the courts to determine whether or not the order as promulgated by the Secretary actually complies with the requirements of the Acts of Congress, which are mandatory.

Petitioner contends that this question was decided in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 565-566.

We submit that this question herein urged was not considered by the Supreme Court in that case.

It is further urged by petitioner that the District Court correctly sustained the motion to strike this defense, *as in any event* there was no prejudicial error in such ruling because the evidence before the Secretary, which was included in respondent's exhibits 1, 2, 3 and 4, was admitted in evidence at the final hearing.

We submit that a careful examination of respondent's exhibits 1 to 4 fail to disclose any competent evidence which warranted such finding on the part of the Secretary.

The fact however is that there was *no hearing* on the *proposed order* as heretofore shown *and no opportunity* given to any of the parties to produce evidence to show the harmful effect of such arbitrary designation of territory by the Secretary. The area finally designated by the Secretary as the marketing area was not known at the time of the hearing by the handlers or producers and presumably included competing territory subsequently arbitrarily omitted. The area was arbitrarily and cap-

riciously designated by the Secretary in violation of the Act without a hearing and without competent evidence to support it, and the order is therefore contrary to provisions of the Act and void.

7. The Eleventh Defense.

The Eleventh Defense (R. 97) sets forth that the order is unenforceable, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of policy of Congress as set forth in Section 1 and Section 2 of said Act for the reasons therein set forth.

Petitioner contends that the Courts are not concerned with the wisdom and economic policy of a regulation imposed under legislative enactment.

Such has been the ruling of the Supreme Court. However, we contend that in view of Sections 1 and 2 of said Act and the express limitation therein "authorizing no action" under said title contrary to the declared policy of Congress, it is the duty of the Courts to determine the validity of all orders promulgated by the Secretary to ascertain whether such action was in conformity with the declared policy of Congress, or whether such action was, in fact, authorized by law.

The motion to strike admitted the facts in said defense alleged, which facts showed a condition created by said order in violation of the declared policy of Congress. The motion to strike should have been denied.

8. The Twelfth Defense.

This defense alleged (R. 118-141) that during the pendency of said cause, the Secretary had promulgated an Order, No. 41, as amended, to regulate the handling of milk, effective July 1st, 1940, in substitution of Order No. 41 herein sought to be enforced. (Compare Order No. 41 (R.

8-22) with the substituted Order (R. 120-141)). Plaintiff admitted the issuance of said amended Order in its supplemental motion for summary judgment (R. 144, 145).

Order No. 41, as amended, does not preserve existent rights under Order No. 41. The amended Order covers the whole subject of Order No. 41, embraces new and different provisions, and plainly shows that it was intended not only as a substitute for the earlier Order but to cover the whole subject. The amended Order clearly repealed the former Order.[39]

Petitioner contends that by Section 941.12c (R. 21) of the Order existing obligations under the Order survived in case of suspension or termination of the Order, and that the amended Order contained an identical clause (R. 140) as in Order No. 41, and that by reason thereof the obligation to make payments by the handler survived.

The Order was neither suspended nor terminated when amended Order No. 41 was promulgated in its place and stead. The provisions of Order No. 41, as amended, never became effective until July 1, 1940, hence, any provisions contained in the amended Order cannot be considered to have a retroactive effect in the absence of an express savings provision.

We submit that had petitioner, when Order No. 41, as amended, effective July 1, 1940, amended its complaint and prayed for relief with regard to Order No. 41, as amended, a different question might have been presented. The complaint, however, seeks a preliminary and permanent injunction against respondent to compel respondent to comply with Order No. 41, which, at the date of the hearing, had

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[39] *Murphy* v. *Utter*, 186 U. S. 95, 105
The Paquete Habana, 175 U. S. 677, 685
United States v. *Tynen*, 11 Wallace, 88, 95, 20 L. Ed. 153, 155

admittedly become ineffective. To issue an injunction to compel respondent to comply with an Order which admittedly was no longer effective would have been a useless act. No money judgment was sought by petitioner (See complaint R. 7). Hence, the court could not grant any effective relief.

The case now presents only a moot question.[40]

CONCLUSION.

We submit that petitioner's contention, that purely intrastate transactions which are in any wise *in competition* with products which cross State lines are subject to Federal control under the Commerce Clause of the Constitution, presents one of the most important constitutional questions submitted to the Courts since the adoption of the Constitution.

The issues presented, briefly, are as follows:

1. Has Congress the power, if it had exercised such power—a fact which we strenuously deny—to deprive the States and the people of the rights reserved to themselves under the Constitution, by embracing transactions having an *indirect* effect upon interstate commerce, (which would practically control all activities of the people), so that the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government?

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[40] *City of Paducah* v. *Paducah Water Co.*, 258 F. 20, 22
Berry v. *Davis*, 242 U. S. 468
W. Ames & Co. v. *Wallace*, 81 F. (2d) 414
Selected Products Corp. v. *Humphreys*, 86 F. (2d) 821 (C.C.A. 7th)

We submit that such a construction would give the Federal Government unlimited power to control every industry, enterprise and endeavor of the people, contrary to the intent of the framers of the Constitution of the United States and its express provisions.

2. May the Courts usurp the functions of Congress by construing an Act contrary to the express intent of Congress and contrary to the express provisions thereof?

The Constitution does not permit the Judicial Department to legislate by construction. Neither can Congress in passing the laws usurp the powers expressly reserved to the States and the people under the Constitution.

As the Supreme Court said in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649,

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

The contention of petitioner presents a dangerous doctrine which, if adopted, would not only revolutionize the settled law of this Country but would act as the entering wedge which ultimately could remove every vestige of State control and State prerogatives in utter disregard of vital and fundamental rights now preserved to the States under the Constitution.

If the Courts can legislate under the guise of construction, or if Congress can, under the pretext of necessity, usurp the powers of the State, in disregard of the express provisions of the Constitution, what assurance is there then that any other provision in the Constitution might not likewise, under the same or some other pretense, be subject

to wrongful amputation or discard by the Courts or Congress?

We submit that if the people actually desire a centralized government with unlimited powers, the only method provided by law to accomplish such purpose is *by amendment* to the Constitution.

Irrespective of this contention, it is evident that Order No. 41 was not issued pursuant to law, is in other respects invalid, and therefore unenforceable and void.

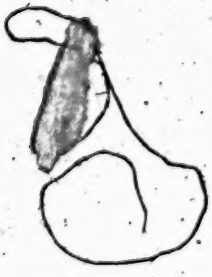
WHEREFORE, it is respectfully submitted that the decision of the Court below be affirmed and that cross-petitioner have such other relief in the premises as to the Court may seem meet.

Respectfully submitted,

ALVIN E. STEIN,
Attorney for Respondent and Cross-Petitioner.

January 1942.

APPENDIX



APPENDIX.

EXCERPTS OF MARKETING AGREEMENT
(Defendant's Exhibit 1, p. 28)

Notice of hearing signed by the Secretary of Agriculture June 9, 1939.

UNITED STATES DEPARTMENT OF AGRICULTURE
Division of Marketing and Marketing Agreements

PROPOSED MARKETING AGREEMENT AND PROPOSED ORDER REGULATING THE HANDLING OF MILK IN THE CHICAGO, ILLINOIS, MARKETING AREA, UPON WHICH THE SECRETARY OF AGRICULTURE HAS ISSUED NOTICE OF HEARING UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Section 1. *Definitions.* (a) Terms. The following terms as used herein *shall* have the following meanings:

(1) The term "Chicago, Illinois, means area," hereinafter called the "marketing area;" means the territory within the corporate limits of Chicago, Illinois, and all that territory lying within the boundaries of Cook County and Du Page County in the State of Illinois; the townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort, and Crete in Will County in the State of Illinois; and the townships of St. John, Ross, North Calumet, and Hobart in Lake County in the State of Indiana.

* * *

(3) The term "producer" means any person, irrespective of whether any such person is also a handler, who produces milk in conformity with, or subject to, the health requirements applicable for milk to be sold for

consumption as milk in the marketing area, and whose milk is received by a handler for shipment to or for sale in the marketing area: Provided, That if such producer has not regularly distributed milk in the marketing area or has not sold milk to a handler for a period of 30 days prior to the effective date hereof but begins the regular delivery of milk to a handler, he shall be known as a "new producer" for a period beginning with the date of his first delivery of milk and including the first 2 full calendar months following the date of such first delivery to a handler, after which he shall be known as a "producer."

(4) The term "handler" means any person, who on his own behalf or on behalf of others, purchases or receives milk from producers, new producers, association of producers, or other handlers, all or a portion of which milk is shipped to or sold in the marketing area in the form of fluid milk, and who on his own behalf or on behalf of others engages in such handling of milk as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include a cooperative association which causes milk to be delivered from a producer or a new producer to a handler, or causes milk of a producer or a new producer to be delivered to a nonhandler's plant from which no milk is sold in the marketing area, for the account of such cooperative association and for which such cooperative association collects payments.

• • •

Sec. 2 Market Administrator.

• • •

(4) Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any per-

son, who, within 2 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to Sec. 3 or (b) made payments pursuant to Sec. 8.

Sec. 3 . . .

(1) On or before the 7th day after the end of each delivery period (a) the receipts of milk at each plant from producers and new producers, (b) the receipts of milk at each plant from handlers, (c) the receipts at each plant of the milk, if any, produced by him, (d) the utilization of all receipts of milk from the delivery period, and (e) the name and address of each new producer.

(2) Within 10 days after the market administrator's request with respect to any producer and new producer for whom such information is not in the files of the market administrator and with respect to a period or periods of time designated by the market administrator (a) the name and address, (b) the total pounds of milk delivered, (c) the average butterfat test of milk delivered, and (d) the number of days upon which deliveries were made.

(3) On or before the 20th day after the end of each delivery period, his producer pay roll, which shall show for each producer and new producer (a) the total delivery of milk with the average butterfat test thereof, (b) the net amount of the payment to such producer and new producer made pursuant to Sec. 8, and (c) the deductions and charges made by the handler.

(4) On or before the 7th day after the end of each delivery period, the sale or disposition of Class I milk outside the marketing area, pursuant to Sec. 5(b) as follows; (a) the amount and the utilization of such milk, (b) the butterfat test thereof, (c) the date of such sale or disposition, (d) the point of use, (e) the plant from

which such milk is shipped, and (f) such other information with respect thereto as the market administrator may require.

• • •

Sec. 4 *Classification of Milk.* (a) *Class definitions.* Milk received by each handler, including milk produced by him, if any, shall be classified by the market administrator as follows:

(1) Class I milk shall be all milk disposed of in the form of milk, whether plain or flavored, and all milk not accounted for as Class II milk or Class III milk.

(2) Class II milk shall be all milk used to produce cream which is disposed of in the form of cream (for consumption as cream), ice cream, and ice cream mix.

• • •

Sec. 5 *Minimum prices.* (a) *Class prices.* Except as set forth in paragraph (b) of this section, each handler shall pay, f. o. b. any plant located not more than 70 miles from the marketing area, at the time and in the manner set forth in Sec. 8 not less than the following prices for milk received at such handler's plant:

Class I milk—The price per hundredweight which shall be calculated by the market administrator as follows: add 80 cents to the price per hundredweight for milk of 3.5 percent butterfat content set forth in the marketing agreement for evaporated milk issued by the Secretary on May 31, 1935, or any amendment issued thereto. Provided, That, in no event shall the price for Class I milk during any delivery period be less than $1.80 per hundredweight or more than $2.20 per hundredweight. In the event the said marketing agreement for evaporated milk be terminated, the price for Class I milk shall be calculated by the market administrator as follows: multiply by 3.5

the average price per pound of 92-score butter at wholesale in the Chicago market for the delivery period during which such milk was received, plus 30 percent thereof, plus 80 cents: Provided, That in no event shall the price for Class I milk during any delivery period be less than $1.80 per hundredweight or more than $2.20 per hundredweight.

Class II milk—The price per hundredweight which shall be calculated by the market administrator as follows: divide by 33 the weighted average wholesale price per 40-quart can of bottling quality cream in the Chicago market, as reported by handlers and other persons receiving such cream for the delivery period during which such milk is delivered, multiply the result thereof by 3.5, subtract therefrom 25 cents per hundredweight, and add ..... cents (an amount equivalent to the value of skim milk).

Class III milk—The price per hundredweight which shall be calculated by the market administrator as follows: Multiply by 3.5 the average price per pound of 92-score butter at wholesale in the Chicago market, as reported by the United States Department of Agriculture, for the delivery period during which such milk is delivered, and add 10 percent.

(b) *Sales outside the marketing area.* The price to be paid by a handler for Class I milk disposed of outside the marketing area, in lieu of the price otherwise applicable pursuant to this section, shall be such price as the market administrator ascertains is being paid by processors in the market where such milk is disposed of for milk of equivalent use.

Sec. 6. *Handlers who are also producers.* (a) *Application of provisions.* No provision hereof shall apply to a handler who is also a producer and who purchases no milk from producers or an association of producers, except

that such handler shall make reports to the market administrator at such time and in such manner as the market administrator may request.

(b) In the case of a handler who is also a producer and who purchased milk from producers, the market administrator shall, before making the computations set forth in Sec. 7, (a) exclude from such handler's Class I milk up to but not exceeding 90 percent of the quantity of milk produced and sold by him, (b) exclude the milk purchased by him in each class from other handlers, and (c) exclude from his remaining Class III milk the balance of the milk produced and sold by him.

Sec. 7 *Determination of uniform prices to producers.* (a) *Computation of value of milk for each handler.* For each delivery period the market administrator shall compute, subject to the provisions of Sec. 6, the value of milk disposed of by each handler which was received from producers and new producers by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to Sec. 5, and (b) adding together the resulting values of each class.

• • •

(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each handler who made the report as required by Sec. 3(a) for such delivery period and who made the payments required by Sec. 8 for milk received during the delivery period next preceding but one;

(2) Subtract the total amount to be paid to producers pursuant to Sec. 8(a)(2);

(3) Divide by the total quantity of milk which is included in these computations except that milk required to be paid for pursuant to Sec. 8(a)(2);

(4) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in Sec. 8(a)(3);

(5) Add an amount which will prorate, pursuant to paragraph (c) of this section, any cash balance available; and

(6) On or before the 12th day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the act, (b) the blended price per hundredweight which is the result of these computations, and (c) the price of Class I milk, Class II milk, and Class III milk.

(c) *Proration of cash balance.* For each delivery period the market administrator shall prorate, by an appropriate addition pursuant to paragraph (b) of this section, the cash balance, if any, in his custody from payments made by handlers for milk received during the delivery period next preceding but one, to meet obligations arising out of Sec. 8(a)(3).

Sec. 8 *Payments for milk.* (a) *Time and method of payment.* On or before the 25th day after the end of each delivery period, each handler shall make payment, subject to the butterfat differential set forth in paragraph (c) of this section, for the total value of milk received during such delivery period as required to be computed pursuant to Sec. 7(a), as follows:

(1) To each producer, except as set forth in subparagraph (2) of this paragraph, at the blended price per hundredweight computed pursuant to Sec. 7(b), subject to the differentials set forth in subparagraph (1) of paragraph (d) of this section, for the quantity of milk delivered by such producer;

(2) To any producer, who did not regularly sell milk for a period of 30 days prior to the effective date hereof to a handler or to persons within the marketing area, at the Class III price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of 2 full calendar months following the date of such first delivery to a handler.

(3) To producers, through the market administrator, by paying to or receiving from the market administrator, as the case may be, the amount by which the payments made pursuant to subparagraphs (1) and (2) of this paragraph are less than, or exceed, the value of milk as required to be computed for such handler pursuant to Sec. 7(a), as shown in a statement rendered by the market administrator on or before the 20th day after the end of such delivery period.

(b) *Errors in payments.* Errors in making any of the payments prescribed in this section shall be corrected not later than the date for making payments next following the determination of such errors.

(c) *Butterfat differential.* If any producer has delivered to any handler during any delivery period milk having an average butterfat content other than 3.5 percent, such handler shall, in making the payments prescribed by subparagraphs (1) and (2) of paragraph (a) of this section to such producer, add for each one-tenth of 1 percent of average butterfat content above 3.5 percent or deduct for each one-tenth of 1 percent of average butterfat content below 3.5 percent 4 cents per hundredweight.

(d) *Location adjustments in making payments to producers.* (1) In making the payments to producers pursuant to subparagraphs (1) and (2) of paragraph (a) of

this section, handlers may deduct, with respect to all milk received by a handler from a producer at a country plant located more than 70 miles from the marketing area, 2 cents per hundredweight for each 15 miles or part thereof in excess of 70 miles from the marketing area.

* * *

Sec. 10. *Marketing services.* (a) *Marketing service deduction.* In making payments to producers and new producers pursuant to Sec. 8 each handler shall, with respect to all milk delivered by each producer and new producer during each delivery period, except as set forth in paragraph (b) of this section, deduct 3 cents per hundredweight, or such lesser amount as the market administrator shall determine to be sufficient, and shall, on or before the *25th* day after the end of such delivery period, pay such deductions to the market administrator. Such moneys shall be expended by the market administrator only in providing for market information to, and for verification of weights, samples, and tests of milk delivered by, such producers and new producers. The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to the milk delivered by, such producers and new producers.

(b) *Marketing service deductions with respect to members of a producers' cooperative association.* In the case of producers and new producers for whom a cooperative association is actually performing the services set forth in paragraph (a) of this section each handler shall, in lieu of the deductions specified in paragraph (a) of this section, make such deductions from payments made pursuant to Sec. 8 as may be authorized by such producers and new producers, and pay over on or before the *25th* day after the end of each delivery period such deduction to the asso-

ciations rendering such service of which such producers and new producers are members.

* * *

Roland W. Bartlett, Professor in the School of Economics at the University of Illinois (Transcript of Testimony, Defts' Ex. 3, p. 166):

"'In the Chicago Market from 1907 to 1919, the country plant price received by dairymen averaged $1.91 per 100 pounds of 3.5 per cent milk and the condensery price, $1.90. Since 1919, producers have received a premium above the condensery price. From 1920 to 1929, this averaged 38 cents per 100 pounds. From 1933 to 1937, the premium again averaged 38 cents, though both series of prices were at a considerably lower level than in 1920-29. For the first eight months of 1938, the premium has averaged 43 cents per 100 pounds of milk.'" (Taken from Exhibit No. 36, p. 203, contained in Defts' Ex. 2)

Mr. M. J. Metzger, representing Bowman Dairy Company (Transcript of Testimony, Defts' Ex. 3, pp. 371, 372):

"I would like to mention, just make a few remarks in reference to class 3. I believe that as provided in the statement by Mr. Cosgrove yesterday, that provides only for prices for butter and cheese. In this market in the past, there have been other demands for excess or surplus milk that returned slightly in excess of butter and cheese at times, such as milk or cream, that goes into cream cheese. There are at times a demand for that.

"There have been times when there has been a demand for milk for chocolate, chocolate candy, chocolate bars, and that sort of thing, and there have been times that milk could be sold, surplus milk could be sold, usually at a price sufficiently under the regular price, for evaporated milk to evaporators, which again would return a better price than butter and cheese.

"I cannot quite understand in my own mind why butter and cheese is provided for in this proposal here, and that cream shall be on a competitive basis and milk for fluid purposes for consumers' use be set up on a pedestal."

Mat Wallrich, Representative of several individual co-operative organizations organized under the Wisconsin Co-Operative Law (Transcript of Testimony, Defts' Ex. 3, p. 523):

"In view of the numerous amendments and suggested revisions of the submitted proposal and also in view of the suggested amendments that will be offered at this time, it is my personal thought that in fairness to the producers who are members of the organizations that I represent, and also in fairness to all producers in this market, that the Secretary, if he determines from the evidence that an order is feasible for this market, submit a tentative draft of the completed or revised order for further study by these producers in order that they may make definite recommendations based upon a tangible definite proposal, and that this tentative proposal be submitted prior to its submission for a referendum vote."

Table 1. - Index numbers of prices paid by farmers for commodities bought
(1910 - 1914 = 100)

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
1910													98
1911													101
1912													100
1913													101
1914													100
1915													105
1916													124
1917													149
1918													176
1919													202
1920													201
1921													152
1922													148
1923			152	152	153	153	152	152	151	151	150	150	152
1924	151	151	152	151	151	150	151	151	152	153	153	154	152
1925	155	157	158	158	158	158	157	156	155	155	155	155	157
1926	155	156	156	156	156	156	156	155	155	155	154	154	155
1927	153	153	152	153	153	154	154	153	153	153	152	152	153
1928	153	153	154	155	155	156	156	155	155	155	154	154	155
1929	154	155	155	154	154	153	153	154	154	153	153	152	153
1930	151	151	150	149	149	148	147	145	144	142	140	138	145
1931	136	134	132	130	129	127	125	123	121	120	118	117	124
1932	115	114	112	111	109	108	107	107	106	105	104	103	107
1933	102	101	100	101	102	103	107	112	116	116	116	116	109
1934	117	119	120	120	121	121	122	125	126	126	126	126	123
1935	126	127	127	127	127	127	126	125	123	123	122	122	125
1936	122	122	121	121	121	120	123	126	127	127	127	128	124
1937	130	132	132	134	134	134	133	132	130	128	127	126	130
1938	126	126	125	125	125	124	123	122	121	121	121	120	123 1/
1939	120	120	120	120 1/	120 1/								

1/ Preliminary.
Compiled from reports of the Bureau of Agricultural Economics.

Table 4.- Prices paid producers per hundredweight of milk Chicago, Illinois, 1909-1933

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909	1.35	1.55	1.45	1.40	1.10	.95	1.05	1.25	1.35	1.55	1.70	1.75	1.39
1910	1.75	1.70	1.55	1.45	1.20	1.05	1.20	1.45	1.60	1.70	1.90	2.00	1.55
1911	2.00	1.90	1.70	1.30	1.10	1.00	1.30	1.45	1.45	1.70	1.85	1.90	1.55
1912	1.85	1.80	1.65	1.30	1.05	1.00	1.30	1.45	1.50	1.60	1.75	1.80	1.50
1913	1.75	1.70	1.60	1.55	1.30	1.10	1.40	1.55	1.55	1.65	1.75	1.85	1.56
1914 1/	1.85	1.75	1.65	1.45	1.20	1.05	1.35	1.50	1.50	1.75	1.85	1.85	1.56
1915	1.85 1/	1.85 1/	1.65 1/	1.45 2/	1.23	1.05	1.31	1.54	1.55	1.73	1.85 2/	1.85 2/	1.58
1916	1.83	1.73	1.61	1.67	1.47	1.26	1.55	1.74	1.70	1.90	2.10	2.13	1.72
1917	2.05	2.00	1.85	2.40	2.00	1.60	2.12	2.30	2.30	3.42	3.22	3.22	2.37
1918	3.22	3.07	2.90	2.65	2.05	1.80	2.30	2.75	2.92	3.32	3.68	3.17	2.87
1919	3.75	3.50	3.00	2.80	2.50	2.50	3.00	3.52	3.55	3.63	3.60	3.65	3.25
1920	3.60	3.35	2.90	2.75	2.70	2.75	3.20	3.70	3.70	3.70	3.05	2.60	3.16
1921	2.50	2.35	2.35	2.35	2.05	2.05	2.30	2.30	1.50	1.75	1.75	1.75	2.08
1922	1.75	1.70	1.70	1.70	1.70	1.60	2.00	2.05	2.00	2.05	2.05	2.10	1.86
1923	2.50	2.50	2.40	2.40	2.30	2.25	2.75	2.75	2.75	2.75	2.75	2.75	2.57
1924	2.675	2.675	2.675	2.50	2.30	2.30	2.50	2.60	2.60	2.40	2.40	2.40	2.50
1925	2.40	2.40	2.40	2.40	2.35	2.30	2.50	2.55	2.55	2.55	2.55	2.50	2.45
1926	2.50	2.50	2.50	2.75	2.50	2.40	2.50	2.60	2.60	2.55	2.50	2.50	2.53
1927	2.50	2.50	2.50	2.50	2.40	2.40	2.50	2.50	2.50	2.50 2	2.50	2.50	2.48
1928	2.50	2.50	2.50	2.50	2.40	2.40	2.50	2.50	2.50	2.50	2.50	2.50	2.48
1929	2.65	2.65	2.65	2.65	2.65	2.65	2.65	2.65	2.75	2.75	2.75	2.75	2.683
1930	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67	2.67
1931	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32	2.32
1932	2.01	2.01	2.01	2.01	2.01	1.85	1.85	1.85	1.85	1.85	1.85	1.45	1.863
1933	1.45	1.45	1.45	1.45	1.45- 1.75	1.75	1.75	1.75	1.75	1.75	1.45- 2.10	1.45- 2.10	1.66

1/ 10 cents premium for 3.8% milk.
2/ Price for 3.5% milk.
Supplied by market administrator in letter of June 2, 1937.

Table 5.- Dealers' buying prices of 3.5% milk per hundredweight Chicago, Illinois, 70-mile zone, and Milwaukee, Kenosha, Racine, South Bend and Rockford, f.o.b. city, 1919-1938

Year	Chicago Illinois, 70-mile zone	F.O.B. City				
		Milwaukee, Wisconsin	Kenosha, Wisconsin	Racine Wisconsin	South Bend: Indiana	Rockford Illinois
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1919	-	3.79	-	-	3.37	3.27
1920	-	3.37	-	-	3.30	-
1921	2.09	2.17	-	-	2.29	2.09
1922	1.86	2.23	-	-	2.04	1.90
1923	2.57	2.84*	-	-	2.43	2.59
1924	2.48	2.75	-	-	2.64	2.68
1925	2.425	2.50	-	-	2.58	2.44
1926	2.52	2.80	-	-	2.55	2.55
1927	2.49	2.93*	3.00	-	2.47	2.55
1928	2.48	2.97*	3.04	-	2.45	2.65
1929	2.67	3.00*	3.15	-	2.50	-
1930	2.67*	2.95*	3.05	-	2.44	2.85
1931	2.32*	2.48*	2.69	-	1.91*	-
1932	1.88*	1.85*	2.11	-	1.82*	1.46
1933	1.70*	1.84*	1.67	-	1.83*	1.36*
1934	2.00*	2.03*	2.00*	2.05*	1.83*	1.68*
1935	-	2.08*	2.03*	2.02*	2.01*	1.85*
1936	1.95*	2.34*	2.34*	2.29*	2.18*	1.90*
1937	2.16*	2.71*	2.75*	2.70*	2.37*	2.05*
1938	1.85*	2.71*	2.75*	2.70*	2.33*	-

* Milk used for city distribution in fluid form.

Compiled from reports of the Bureau of Agricultural Economics.

Table 6.- Milk, whole: Wholesale prices per hundredweight received by farmers in Illinois, 1909-1939

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.25	1.35	1.55	1.65	1.75	
1910	1.75	1.70	1.55	1.45	1.15	1.05	1.20	1.30	1.45	1.70	1.85	1.95	1.50
1911	1.95	1.90	1.70	1.30	1.10	1.00	1.30	1.45	1.45	1.65	1.80	1.85	1.50
1912	1.85	1.80	1.65	1.30	1.05	1.00	1.25	1.40	1.45	1.60	1.75	1.80	1.45
1913	1.75	1.70	1.60	1.50	1.25	1.15	1.35	1.50	1.55	1.75	1.80	1.90	1.55
1914	1.90	1.75	1.65	1.45	1.20	1.15	1.35	1.50	1.55	1.75	1.85	1.85	1.55
1915	1.85	1.75	1.65	1.45	1.20	1.10	1.30	1.45	1.45	1.65	1.80	1.80	1.50
1916	1.75	1.70	1.60	1.60	1.45	1.25	1.45	1.60	1.65	1.85	2.05	2.10	1.65
1917	2.05	2.00	1.85	2.25	1.90	1.60	2.10	2.25	2.30	3.40	3.20	3.20	2.30
1918	3.20	3.10	2.95	2.65	2.05	1.80	2.30	2.75	2.95	3.35	3.70	3.75	2.80
1919	3.75	3.50	3.05	2.80	2.45	2.55	3.00	3.45	3.65	3.70	3.65	3.70	3.20
1920	3.65	3.35	2.95	2.80	2.75	2.75	3.20	3.55	3.60	3.35	2.95	2.60	3.10
1921	2.45	2.30	2.20	2.20	1.95	1.80	2.00	2.10	1.65	1.80	1.85	1.80	2.00
1922	1.75	1.60	1.60	1.55	1.55	1.50	1.80	1.90	1.90	2.00	2.10	2.25	1.75
1923	2.50	2.45	2.35	2.30	2.15	2.10	2.45	2.50	2.55	2.60	2.60	2.60	2.40
1924	2.60	2.55	2.50	2.30	2.10	2.05	2.25	2.30	2.35	2.25	2.25	2.25	2.30
1925	2.40	2.25	2.20	2.15	2.10	2.05	2.25	2.30	2.35	2.40	2.40	2.40	2.25
1926	2.40	2.35	2.35	2.30	2.20	2.15	2.25	2.35	2.40	2.40	2.45	2.45	2.30
1927	2.45	2.40	2.40	2.36	2.15	2.10	2.20	2.25	2.35	2.40	2.45	2.45	2.30
1928	2.45	2.40	2.35	2.30	2.15	2.15	2.30	2.30	2.35	2.40	2.45	2.45	2.35
1929	2.50	2.50	2.40	2.30	2.20	2.15	2.25	2.35	2.40	2.45	2.50	2.45	2.35
1930	2.35	2.25	2.25	2.20	2.10	2.00	2.10	2.20	2.25	2.25	2.20	2.10	2.20
1931	1.85	1.80	1.80	1.75	1.65	1.65	1.80	1.80	1.85	1.90	1.85	1.75	1.80
1932	1.45	1.45	1.40	1.35	1.30	1.25	1.30	1.30	1.35	1.35	1.35	1.15	1.35
1933	1.10	1.10	1.10	1.10	1.15	1.20	1.30	1.30	1.35	1.35	1.45	1.40	1.25
1934	1.30	1.30	1.35	1.30	1.30	1.40	1.45	1.50	1.50	1.55	1.55	1.65	1.45
1935	1.65	1.65	1.65	1.65	1.45	1.35	1.35	1.40	1.45	1.50	1.60	1.75	1.50
1936	1.75	1.75	1.70	1.60	1.45	1.55	1.80	1.95	2.00	2.00	2.00	2.00	1.80
1937	2.00	2.00	2.00	1.85	1.75	1.70	1.70	1.85	1.95	2.05	2.10	2.10	1.90
1938	2.00	1.90	1.80	1.70	1.55	1.50	1.50	1.55	1.60	1.65	1.65	1.70	1.68
1939	1.65	1.55	1.55	1.45	1.40								

Compiled from reports of the Bureau of Agricultural Economics.

Table 7.- Milk, whole: Wholesale price per hundredweight received by farmers in Indiana, 1909-1939

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.35	1.45	1.55	1.90	1.90	
1910	1.95	1.90	1.80	1.70	1.45	1.35	1.35	1.45	1.50	1.80	1.95	2.10	1.65
1911	2.10	2.10	1.95	1.65	1.35	1.30	1.35	1.50	1.55	1.70	1.85	2.00	1.65
1912	1.95	1.90	1.80	1.60	1.35	1.30	1.40	1.60	1.65	1.70	1.95	2.00	1.65
1913	2.00	1.95	1.90	1.80	1.45	1.40	1.45	1.60	1.70	1.80	2.05	2.10	1.75
1914	2.10	2.05	1.95	1.80	1.45	1.35	1.50	1.65	1.70	1.80	2.00	2.10	1.75
1915	2.10	2.05	1.95	1.75	1.45	1.40	1.40	1.55	1.55	1.65	1.85	2.00	1.70
1916	2.15	2.05	1.95	1.90	1.65	1.55	1.60	1.70	1.85	2.00	2.30	2.40	1.90
1917	2.35	2.30	2.20	2.25	2.25	2.10	2.20	2.35	2.50	3.05	3.30	3.35	2.50
1918	3.35	3.25	2.95	2.70	2.45	2.15	2.35	2.70	3.00	3.30	3.60	3.80	2.90
1919	3.75	3.45	3.30	3.20	2.95	2.85	3.00	3.30	3.40	3.65	3.80	3.90	3.35
1920	3.80	3.65	3.35	3.25	3.10	2.90	3.00	3.20	3.30	3.35	3.15	2.95	3.25
1921	2.80	2.55	2.50	2.40	2.15	1.95	2.20	2.30	2.05	2.10	2.15	2.20	2.25
1922	2.10	1.95	1.90	1.85	1.80	1.75	1.85	2.00	2.10	2.20	2.35	2.50	2.00
1923	2.60	2.60	2.55	2.50	2.40	2.30	2.40	2.55	2.60	2.70	2.75	2.85	2.55
1924	2.80	2.70	2.65	2.50	2.20	2.10	2.10	2.20	2.25	2.25	2.30	2.40	2.35
1925	2.40	2.35	2.30	2.25	2.20	2.15	2.25	2.30	2.40	2.55	2.60	2.65	2.35
1926	2.60	2.55	2.45	2.40	2.30	2.25	2.30	2.30	2.35	2.45	2.55	2.65	2.40
1927	2.65	2.60	2.55	2.50	2.40	2.30	2.30	2.40	2.45	2.50	2.60	2.70	2.50
1928	2.65	2.60	2.55	2.45	2.40	2.35	2.35	2.40	2.55	2.60	2.75	2.75	2.50
1929	2.75	2.65	2.65	2.55	2.40	2.35	2.40	2.40	2.50	2.55	2.65	2.60	2.50
1930	2.50	2.40	2.30	2.25	2.15	2.05	2.05	2.15	2.25	2.30	2.25	2.15	2.25
1931	2.00	1.80	1.75	1.65	1.60	1.55	1.60	1.65	1.75	1.80	1.80	1.80	1.70
1932	1.65	1.55	1.50	1.40	1.30	1.20	1.25	1.25	1.35	1.40	1.45	1.45	1.40
1933	1.30	1.25	1.20	1.20	1.20	1.25	1.35	1.35	1.40	1.50	1.50	1.40	1.30
1934	1.40	1.50	1.50	1.40	1.35	1.40	1.40	1.50	1.50	1.55	1.60	1.65	1.45
1935	1.65	1.65	1.60	1.55	1.50	1.50	1.50	1.50	1.50	1.55	1.60	1.80	1.55
1936	1.80	1.80	1.80	1.75	1.70	1.60	1.80	2.00	2.00	2.10	2.20	2.20	1.90
1937	2.20	2.10	2.10	2.05	1.95	1.85	1.85	2.00	2.10	2.15	2.25	2.25	2.05
1938	2.05	2.00	1.90	1.85	1.65	1.60	1.65	1.65	1.75	1.75	1.80	1.80	1.80
1939	1.80	1.80	1.65	1.60	1.55								

Compiled from reports of the Bureau of Agricultural Economics.

Table 8.- Milk, whole: Wholesale prices per hundredweight received by farmers in Wisconsin, 1909 - 1939

Year	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.15	1.27	1.35	1.42	1.51	
1910	1.44	1.36	1.25	1.20	1.12	1.09	1.11	1.21	1.28	1.30	1.37	1.38	1.24
1911	1.28	1.20	1.08	.94	.89	.94	1.04	1.14	1.21	1.34	1.49	1.54	1.14
1912	1.56	1.44	1.31	1.24	1.19	1.09	1.13	1.18	1.30	1.41	1.53	1.57	1.30
1913	1.50	1.43	1.36	1.27	1.16	1.16	1.16	1.25	1.39	1.45	1.50	1.61	1.33
1914	1.56	1.46	1.35	1.25	1.13	1.13	1.17	1.27	1.32	1.37	1.45	1.46	1.31
1915	1.42	1.38	1.32	1.32	1.22	1.18	1.11	1.14	1.24	1.34	1.53	1.62	1.30
1916	1.56	1.60	1.61	1.47	1.31	1.27	1.25	1.45	1.69	1.86	1.94	2.05	1.55
1917	1.98	2.04	2.02	2.08	2.00	1.92	1.92	2.14	2.42	2.62	2.71	2.82	2.18
1918	2.84	2.80	2.51	2.25	2.09	1.96	2.14	2.38	2.75	3.25	3.56	3.64	2.60
1919	3.13	2.80	2.75	2.64	2.59	2.66	2.72	2.86	2.87	3.03	3.22	3.28	2.85
1920	3.22	2.96	2.70	2.70	2.62	2.44	2.46	2.56	2.57	2.46	2.38	2.22	2.60
1921	2.07	2.01	2.10	1.86	1.37	1.26	1.39	1.62	1.62	1.75	1.82	1.81	1.69
1922	1.62	1.58	1.57	1.50	1.42	1.44	1.52	1.54	1.65	1.86	2.12	2.29	1.64
1923	2.38	2.29	2.18	2.00	1.91	1.93	1.95	2.00	2.10	2.15	2.21	2.25	2.09
1924	2.26	2.15	2.02	1.72	1.59	1.61	1.63	1.61	1.66	1.66	1.73	1.83	1.77
1925	1.84	1.85	1.88	1.86	1.83	1.82	1.87	1.88	1.91	2.06	2.14	2.12	1.90
1926	2.11	2.04	1.96	1.84	1.80	1.74	1.79	1.82	1.89	2.04	2.15	2.25	1.92
1927	2.25	2.22	2.11	2.05	1.98	1.96	1.98	2.04	2.14	2.28	2.32	2.35	2.11
1928	2.34	2.25	2.15	2.07	2.00	2.03	2.09	2.14	2.18	2.23	2.23	2.25	2.15
1929	2.23	2.17	2.13	2.06	1.98	1.95	1.93	1.98	2.05	2.11	2.09	1.97	2.05
1930	1.81	1.75	1.72	1.68	1.60	1.51	1.52	1.60	1.68	1.69	1.60	1.50	1.63
1931	1.35	1.28	1.23	1.08	1.01	.99	1.03	1.12	1.23	1.29	1.24	1.20	1.15
1932	1.07	.96	.93	.88	.80	.77	.79	.84	.92	.95	.95	.97	.89
1933	.90	.82	.80	.88	.99	1.05	1.08	1.05	1.06	1.08	1.07	.96	.98
1934	.97	1.11	1.13	1.04	1.02	1.06	1.04	1.09	1.10	1.14	1.22	1.26	1.09
1935	1.38	1.45	1.38	1.36	1.27	1.16	1.16	1.22	1.28	1.35	1.48	1.61	1.32
1936	1.58	1.51	1.43	1.32	1.28	1.34	1.52	1.66	1.71	1.66	1.67	1.67	1.51
1937	1.66	1.63	1.62	1.53	1.46	1.44	1.46	1.52	1.64	1.75	1.80	1.78	1.59
1938	1.62	1.49	1.39	1.29	1.23	1.20	1.25	1.20	1.20	1.25	1.20	1.25	1.28
1939	1.25	1.20	1.10	1.10	1.05								

Compiled from reports of the Bureau of Agricultural Economics.

Table 9.- Milk, whole: Wholesale prices per hundredweight received by farmers in Wisconsin, 1909 - 1939

Year	Jan.	Feb.	March	April	May	June	July	August	Sept.	Oct.	Nov.	Dec.	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909								1.20	1.25	1.45	1.50	1.55	
1910	1.55	1.55	1.40	1.35	1.10	1.10	1.20	1.35	1.50	1.70	1.75	1.75	1.40
1911	1.75	1.70	1.60	1.25	1.05	1.05	1.20	1.35	1.50	1.60	1.75	1.75	1.40
1912	1.65	1.35	1.60	1.30	1.15	1.10	1.25	1.40	1.50	1.70	1.80	1.85	1.45
1913	1.86	1.80	1.60	1.35	1.25	1.20	1.30	1.45	1.55	1.75	1.80	1.90	1.55
1914	1.85	1.85	1.75	1.45	1.25	1.20	1.35	1.45	1.55	1.75	1.80	1.80	1.55
1915	1.85	1.85	1.75	1.40	1.25	1.20	1.35	1.45	1.55	1.70	1.75	1.85	1.55
1916	1.75	1.70	1.65	1.40	1.30	1.25	1.45	1.65	1.70	2.00	2.05	2.10	1.65
1917	2.15	2.25	2.15	1.90	1.65	1.65	2.20	2.45	2.55	2.70	2.80	3.25	2.25
1918	3.30	3.20	3.15	2.75	2.35	2.10	2.45	2.90	3.20	3.40	3.55	3.85	2.95
1919	3.75	3.60	3.30	3.15	3.00	2.90	3.25	3.70	3.80	3.90	3.90	3.90	3.45
1920	3.80	3.75	3.55	3.40	3.10	3.05	3.35	3.45	3.70	3.50	3.45	2.70	3.40
1921	2.55	2.30	2.30	2.30	2.10	1.95	2.00	2.25	2.25	2.25	2.15	2.20	2.20
1922	2.15	2.15	1.95	1.90	1.90	1.85	1.95	2.15	2.20	2.20	2.35	2.55	2.10
1923	2.60	2.50	2.45	2.40	2.30	2.25	2.35	2.60	2.65	2.70	2.55	2.55	2.45
1924	2.45	2.40	2.30	2.10	2.00	1.95	2.05	2.10	2.15	2.20	2.15	2.20	2.15
1925	2.25	2.20	2.20	2.20	2.15	2.10	2.20	2.30	2.30	2.35	2.45	2.45	2.25
1926	2.40	2.35	2.30	2.25	2.15	2.10	2.15	2.30	2.30	2.40	2.45	2.45	2.30
1927	2.45	2.45	2.45	2.40	2.25	2.15	2.20	2.30	2.40	2.45	2.50	2.50	2.35
1928	2.45	2.40	2.35	2.35	2.25	2.15	2.30	2.40	2.45	2.50	2.55	2.55	2.35
1929	2.55	2.50	2.45	2.40	2.30	2.20	2.25	2.40	2.45	2.55	2.55	2.40	2.40
1930	2.25	2.15	2.15	2.10	2.00	1.95	2.00	2.10	2.30	2.20	2.05	1.95	2.10
1931	1.80	1.70	1.65	1.60	1.50	1.55	1.40	1.55	1.60	1.50	1.40	1.35	1.55
1932	1.25	1.20	1.15	1.10	1.10	1.05	1.05	1.05	1.10	1.05	1.05	1.05	1.10
1933	1.05	1.05	1.00	1.00	1.05	1.10	1.20	1.30	1.35	1.35	1.40	1.30	1.15
1934	1.30	1.35	1.40	1.40	1.35	1.35	1.45	1.55	1.55	1.55	1.65	1.65	1.45
1935	1.65	1.70	1.65	1.65	1.50	1.50	1.50	1.55	1.60	1.70	1.75	1.85	1.60
1936	1.90	1.80	1.70	1.70	1.65	[illegible]	1.80	1.90	1.95	1.95	2.00	2.00	1.80
1937	2.00	1.95	1.95	1.95	1.85	1.80	1.85	1.95	2.00	2.10	2.20	2.20	1.95
1938	2.00	1.90	1.85	1.75	1.65	1.55	1.55	1.60	1.65	1.70	1.75	1.80	1.70
1939	1.70	1.65	1.65	1.50	1.45								

Compiled from reports of the Bureau of Agricultural Economics.

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CHARLES ELMORE CROP
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 783

UNITED STATES OF AMERICA,
Petitioner,

vs.

WRIGHTWOOD DAIRY COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Cross-Respondent,

vs.

WRIGHTWOOD DAIRY COMPANY,
Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALVIN E. STEIN,
Attorney for Cross-Petitioner.

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INDEX.

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
THE STATUTES AND ORDERS INVOLVED	3
STATEMENT	3
SPECIFICATION OF ERRORS TO BE URGED	6
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	7
BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI	8
I. The Court erred in finding contrary to the law and the evidence that the Order was promulgated by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred	8
a. The Secretary did not give due notice and opportunity for a hearing upon Order No. 41 herein sought to be enforced	8
b. Order No. 41 never became legally effective because the required approval of producers was never properly secured	10
c. The Order is void on *its face* in failing to comply with Sections 8c(4) and 8c(9) of the Act	10
d. The Order is contrary to the express provisions of Section 8c(5)G of the Act and other provisions thereof and illegally delegates legislative authority to the Market Administrator and others in violation of the Federal Constitution	11

PAGE

II. The District Court committed prejudicial error in striking defendant's Fourth to Eleventh Defenses, both inclusive 14
1. The Fourth Defense 11, 14
2. The Fifth Defense 14
3. The Sixth Defense 15
4. The Seventh Defense 15, 17
5. The Eighth and Ninth Defenses 8, 10, 17
6. The Tenth Defense 17
7. The Eleventh Defense 19
8. The Twelfth Defense 20

Table of Citations.

Cases:

W. Ames & Co. v. Wallace, 81 F. (2d) 414 21
Berry v. Davis, 242 U. S. 458 21
City of Paducah v. Paducah Water Co., 258 F. 20 21
H. P. Hood & Sons v. United States, 307 U. S. 588 ..... 8, 13
Murphy v. Utter, 186 U. S. 95 20
Selected Products Corp. v. Humphreys, 86 F. (2nd) 821 (C. C. A. 7th) 21
The Paquete Habana, 175 U. S. 677 20
United States v. Rock Royal Co-Operative, Inc., 307 U. S. 533 15
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 17
United States v. Tynen, 11 Wall. (U. S.) 88 20

Statutes:

Agricultural Adjustment Act of 1937, Act of May 12, 1933, as re-enacted and amended (Title 7 U. S. C. A. Sec. 601 *et seq.*) 3, 5, 9, 11, 14, 15
Anti-Trust Laws 16
Bituminous Coal Act, April 26, 1937 (Title 15 U. S. C. A. Sec. 832(d)) 16
Motor Carrier Act of 1935, as amended (Title 49 U. S. C. A. Sec. 313 (f)) 16, 17
National Industrial Recovery Act, June 16, 1933 (Title 15 U. S. C. A. Sec. 701) 16

IN THE

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UNITED STATES OF AMERICA,
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UNITED STATES OF AMERICA,
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vs.

WRIGHTWOOD DAIRY COMPANY,
Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CROSS-PETITION.

Wrightwood Dairy Company, an Illinois corporation, defendant below and cross-petitioner herein, prays in the event a writ of certiorari on the petition of the United

States of America in the above entitled cause is granted, that a writ of certiorari issue also to review the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, entered in the above entitled cause on October 27, 1941, dismissing the cross-appeal of Wrightwood Dairy Company, cross-petitioner herein.

Opinions Below.

No opinion was rendered by the United States District Court for the Northern District of Illinois, Eastern Division. The District Court's findings of fact and conclusions of law appear in the record (R. 245-247). The opinion of the Circuit Court of Appeals (R. 270) has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 275). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.[1]

1. Is Order No. 41 valid and enforcible and was it promulgated by the Secretary of Agriculture in full compliance with the law and had all conditions precedent to the effectiveness of said order occurred.

2. Does the Agricultural Marketing Agreement Act of 1937, or portions thereof not heretofore passed upon by the Supreme Court, violate Article I, Section 1 and Article I, Section 8, Paragraph 18 of the Constitution of the United States.

3. Is said Act invalid for being in conflict with the anti-trust laws of the United States and of the State of Illinois,

---

[1] There may be other related questions involved in the specifications of errors hereinafter set forth (p. 6) that are also relied upon by cross-petitioner herein.

in the absence of any provision in the act exempting participants from prosecution under existing anti-trust laws.

4. Does this case present a moot question in view of the abandonment of Order No. 41 by the Secretary of Agriculture during the pendency of the cause when he amended Order No. 41 and promulgated a different order in its place.

The Statutes and Orders Involved.

The Statute involved is the Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246) (7 U. S. C. A. Sec. 601 et seq.)

Order No. 41 herein relied upon by respondent, was promulgated by the Secretary of Agriculture on August 28, 1939, effective September 1, 1939 (R. 8-22).

On June 21, 1940, during the pendency of this action below, the Secretary of Agriculture promulgated another amended order, effective July 1, 1940, in the place of said Order No. 41, which substituted order *inter alia* established a new marketing area and materially changed the various classes of persons who were subject to its provisions and reclassified milk and milk products and substituted different provisions. The amended Order did not preserve any existing rights under Order No. 41 (R. 120-141).

Statement.

Order No. 41, herein relied upon by the Government, was promulgated by the Secretary of Agriculture under the following circumstances:

The uncontradicted evidence shows that the Secretary of Agriculture gave notice of a public hearing on June 9, 1939, regarding a proposed marketing agreement and order regulating the handling of milk "prepared and proposed by the Pure Milk Association and the Chicago Milk Pro-

ducers Council, Inc.", covering the territory lying within the limits of Chicago, Illinois, and all that territory lying within the boundaries of Cook County, Du Page County, in the State of Illinois, and townships of Wheaton, Du Page, Plainfield, Lockport, Homer, Troy, New Lenox, Frankfort and Crete, in Will County, in the State of Illinois, and the townships of St. John, Ross, North Calumet, and Hobart, in Lake County, in the State of Indiana (Defs. Ex. 1, p. 28).

All of the evidence taken at the hearing was with respect to the proposed marketing agreement and the proposed marketing area therein defined.[2] No action was taken thereon, but on August 18, 1939, the Secretary of Agriculture submitted *a new and different marketing agreement or order*[3] covering a much smaller territory, namely the City of Chicago, Evanston, Wilmette, Kenilworth, Winnetka and Glencoe in the State of Illinois and containing different provisions, to *some of the producers but not all*[4] for referendum. This was done without any public hearing or notice to handlers or others.

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[2] The cross-petitioner, defendant below, introduced at the hearing defendant's Exhibits 1, 2, 3 and 4 which are admitted by the cross-respondent, plaintiff below, to constitute all of the evidence upon which the Secretary of Agriculture made his findings and fixed the terms and provisions containing the Order No. 41 (R. 201). This record has not been reprinted but has been certified to the Court in its original form.

[3] See Order No. 41 (R. 8-22) and compare with Marketing Agreement set forth and considered at public hearing defendant's Exhibit 1, p. 28, attached as appendix to Cross-petitioner's Brief in Court below.

[4] See affidavit of Mr. Connor, Referendum Agent (R. 115) and testimony of Mr. Krueger, Chief Sanitary Officer of Board of Health of City of Chicago (R. 220, 221).

In the referendum all of the producers in the area did not participate therein and said order was not approved or favored by two-thirds of all the producers in the area.[5]

The United States, cross-respondent herein, filed its complaint on December 26, 1939, to compel cross-petitioner to comply with Order No. 41 (R. 2-7). The defendant filed twelve (12) separate defenses and a counter-claim praying that the government be enjoined from enforcing Order No. 41 against cross-petitioner herein. Said defenses are fully set forth in the Record pp. 84-100, 104, 118, and for the sake of brevity are not copied herein. The United States Government, plaintiff below, filed a motion to strike defenses numbered three (3) to eleven (11), both inclusive (R. 156). The trial court overruled plaintiff's motion to strike the Third Defense and sustained the motion to strike the fourth (4th) to eleventh (11th) defenses (R. 244). A trial was had and judgment entered in favor of the defendant dismissing the complaint and granting injunctive relief against the United States under the counter-claim (R. 247-248).

The plaintiff appealed from the judgment and defendant filed its cross-appeal, No. 7620, alleging *inter alia*, that the District Court failed to find that Order No. 41 sought to be enforced against the defendant was not in compliance with the law and that all conditions precedent to the effectiveness of said order had not occurred, and that said Order No. 41 was unconstitutional, invalid, unenforcible and contrary to the provisions of the Agricultural Marketing Agreement Act of 1937, and that the Court erred in sustaining plaintiff's motion to strike defendant's fourth (4th) to eleventh (11th) defenses, both inclusive (R. 259-261). The Circuit Court of Appeals affirmed the judgment of the

---

[5] Section 8c(9) of said Act, in effect provides that no order shall *become effective* unless it shall be approved by at least two-thirds of the producers.

trial Court, but in view of its decision did not deem it necessary to discuss the errors assigned on the cross-appeal, (R. 274) and dismissed the cross-appeal (R. 275). The failure of the lower court to consider the errors relied upon and urged on cross-appeal and in dismissing the cross-appeal is the subject matter of this cross-petition.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in refusing to consider the errors, and each of them, relied upon by cross-petitioner in its cross-appeal in that court, and in dismissing said cross-appeal.

Specifically, the Circuit Court of Appeals erred:

1. In failing to find that the District Court should have found from the uncontradicted evidence and the law that Order No. 41 was not in compliance with the law and that all conditions precedent to the effectiveness of said Order had not occurred and that said Order was therefore contrary to the provisions of the Act in question and therefore invalid and not enforcible.

2. In failing to find that the District Court erred in sustaining plaintiff's motion to strike defendant's Fourth (4th) to Eleventh (11th) Defenses, and each of them, filed by defendant to plaintiff's complaint.

3. In failing to hold that the case presented only a moot question, since Order No. 41 became ineffective during the pendency of the cause in the District Court.

Reasons for Granting the Writ.

The Circuit Court of Appeals did not deem it necessary, in view of its affirmance of the judgment, to discuss the errors assigned by this cross-petitioner on its cross-appeal and dismissed said cross-appeal.

The errors assigned on the cross-appeal involve the validity of the Agricultural Marketing Agreement Act of 1937 and Order No. 41 herein sought to be enforced. The cross-petitioner herein has been held not to be a "handler" within the provision of the Act and therefore not subject to the order in question. However, if there be any question as to the applicability of the Order to the cross-petitioner, then, and in such event, the validity of the Act and whether the Order conforms to the provisions of said Act and is valid and enforcible becomes of the greatest importance.

The questions herein involved have not heretofore been passed upon by the Supreme Court and should be settled by this Court.

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this cross-petition for writ of certiorari should be granted in the event a writ of certiorari on the petition of the United States of America in the above entitled cause should be allowed.

ALVIN E. STEIN,
Attorney for Cross-Petitioner.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

I.

The Court erred in finding contrary to the law and the evidence that the Order was promulgated by the Secretary in full compliance with the law and that all conditions precedent to the effectiveness of said Order have occurred.

This defense was made in defendant's second (2nd) defense (R. 84-87), and also in defendant's ninth (9th) defense (R. 96). The motion to strike the ninth (9th) defense was sustained by the trial Court on the ground that it was "superfluous" (R. 194).

It is fundamental that any order by the Secretary of Agriculture must conform to the provisions of the Act and all conditions precedent to the effectiveness of said order must have occurred.[1]

a. The Secretary did not give due notice and opportunity for a hearing upon Order No. 41 herein sought to be enforced.

---

[1] The Supreme Court in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 589 states the proposition concisely as follows:

> "The question is simply whether the statute was followed."

Notice and opportunity for a hearing is made a prerequisite to the issuance of an order by the Secretary under the Act.[2]

The defendant below introduced at the hearing of the cause defendant's Exhibits 1, 2, 3 and 4 which are admitted by the plaintiff to constitute *all* of the evidence upon which the Secretary made his findings and fixed the terms and provisions contained in the order. (Cross-Respondent's Brief below p. 21, R. 201).

The fact is that defendant's Exhibits 1, 2, 3 and 4 show that the hearing was had in connection with another marketing agreement and order proposed by Pure Milk Association and the Chicago Milk Producers Council, Inc., pro-

[2] Section 8c(3) of the Agricultural Marketing Agreement Act of 1937 provides: "* * * *he shall give due notice of and an opportunity for a hearing upon a proposed order.*"

Section 8c(4) provides: "*After such notice and opportunity for hearing,* the Secretary of Agriculture shall issue an order, if he *find* and *sets forth in such order,* upon the evidence introduced *at such hearing* (in addition to *such other findings as may be specifically required by this section*) that * * *."

Section 8c(9) provides: "Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers * * * to sign a marketing agreement relating to such commodity or product thereof, *on which a hearing has been held,* the Secretary of Agriculture, with the approval of the President, determines: * * *."

Section 8c(10) provides: "*No order shall be issued* under this section *unless* it regulates the handling of the commodity or product covered thereby in the same manner as and is made applicable *only to persons* in the respective classes in the industrial or commercial activity specified in, a marketing agreement *upon which a hearing has been held.*"

Section 8c(17) requires "that notice of a hearing upon a proposed amendment to any order issued pursuant to Section 8c, *given not less than three days* prior to the date fixed for such hearing, shall be deemed notice thereof."

viding for a marketing area covering a large territory including many counties and townships in Illinos and a number of townships in Indiana. The terms and conditions of the proposed order differed materially from Order No. 41.[3]

Order No. 41 was promulgated without a public hearing or notice or opportunity for a hearing to producers or handlers of the product and in violation of Sections 8c(3), 8c(4), 8c(9), 8c(10) and 8c(17) and is therefore void.

b. Order No. 41 never became legally effective because the required approval of producers was never properly secured.

Under Section 8c(9) an order can only become effective in the event that at least two-thirds of the producers approve or favor the order. Section 8c(19) provides for a referendum to ascertain if the total number of producers represented in such referendum approving or favoring is equal to or in excess of the percentage required under such provision.

The uncontradicted evidence shows that the referendum conducted by the Secretary was not a referendum of all of the producers as required under Sections 8c(9) and 8c(19) but that only a portion of the producers were notified and requested to participate in the referendum.[4]

c. The order is void on ITS FACE in failing to comply with Sections 8c(4) and 8c(9) of the Act.

A determination by the Secretary, which is made a condition precedent to the effectiveness of the order, must by reason of the positive provisions of the Act[5] be *found* as a fact by the Secretary and *set forth in such order.*

The finding of the Secretary recited in the order (R. 9) that over sixty-seven (67%) per cent of the producers

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[3] See Defendant's Exhibit 3, pp. 3, 5.

[4] See affidavit of Mr. Connor, Referendum Agent (R. 115) and testimony of Mr. Krueger (R. 220, 221).

[5] Sections 8c(4) and 8c(9).

"voting in a referendum had approved or favored the order" does not comply with the provisions of the Act which requires a determination that more than two-thirds of the producers who, during such representative period, had been engaged in the production of such commodity for sale in the marketing area approved or favored the order. All of the producers entitled to vote did not participate in the referendum, and the finding that sixty-seven (67%) per cent of the number *voting* favored the order is not a compliance with the Act, since said sixty-seven (67%) per cent of those voting may actually constitute but a small percentage of the total number of producers who were entitled to vote in the referendum.

d. The order is contrary to the express provisions of Section 8c(5)G of the Act and other provisions thereof and illegally delegates legislative authority to the Market Administrator and others in violation of the Federal Constitution.

This defense is specifically set forth in the Fourth Defense of defendant's Answer and is also included in the denial contained in the Second Defense.

In Section 2 of the Act [6] Congress in declaring the policy of Congress expressly *prohibits* any action under said title

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[6] "(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities *in interstate commerce*, as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; * * * The base period in the case of all agricultural commodities except tobacco and potatoes shall be pre-war period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the post-war period, August 1919-July 1929.

"(2) *To protect the interest of the consumer* by * * * (b) *authorizing no action* under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish *in subsection* (1) *of this* section."

which in any wise contravenes the declared policy and limitations in said section provided.

It follows that any order promulgated by the Secretary of Agriculture in violation of this section is not authorized by law and is clearly void.

Under Section 8(e) it is provided that if the Secretary *finds and proclaims* that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in Section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919-July 1929, or all that portion thereof for which the Secretary *finds and proclaims* that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

It will be noted that under this section, the Secretary of Agriculture is required to *find in the order* that the purchasing power, during the base period specified for such commodity in Section 2, cannot be satisfactorily determined from available statistics of the Department of Agriculture, and if he does so, he may then use the post-war period, August 1919-July 1929.

This finding must be set forth in the order as being one of the findings specifically required in addition to those specified in Section 8c(4).

While the order recites that the Secretary has found and proclaimed the period August 1919-July 1929 to be the base period to be used in determining the purchasing power of milk sold in the Chicago, Illinois Marketing Area (R. 10), we find no finding, as required by Section 8c(4) and Section 8(e), that the purchasing power during the base period specified for milk in Section 2 of said Act cannot

be satisfactorily determined from vital statistics of the Department of Agriculture.

We submit that the order is void for this reason.[7]

The requirement on the part of the Secretary to make a finding and proclamation only in the event that statistics are not available in the Department of Agriculture so that the purchasing power during the base period could not be satisfactorily determined, is a material and not a mere technical requirement.

However, we believe that there was a cogent reason why the Secretary did not, in his finding, state that there were no available statistics in the Department of Agriculture, as required by law, because the evidence submitted at the hearing on the proposed order of the Pure Milk Association, et al., showed that the United States Department of Agriculture had the necessary data in its possession and in fact, offered the same in evidence at the hearing thereof.[8]

We submit that in the absence of a showing and proper finding by the Secretary that the statistics are not available as required by Section 8(e) the order is void and is not authorized by and contrary to Section 2 of said Act.

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[7] In *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 595, the Supreme Court said:

> "Ordinarily the base period of section 2 is to be used. It is *only after a finding* that the purchasing power of the commodity during the period fixed in section 2 cannot be satisfactorily determined from available statistics of the Department of Agriculture, that the Secretary, by section 8e, is authorized *to find* and *proclaim* the post-war period." (Italics ours.)

[8] See United States Department of Agriculture "Exhibit 2" offered in evidence at the hearing and incorporated in defendant's Exhibit 1 herein, Tables 1 to 9, both inclusive, which shows that the Department of Agriculture had the necessary statistics in its possession.

II.

The District Court committed prejudicial error in striking Defendant's Fourth to Eleventh Defenses, both inclusive.

1. The Fourth Defense.

This defense was discussed under point I, d., (*supra*).

2. The Fifth Defense.

The Fifth Defense alleges that the Act is unconstitutional and void in that it delegates to the Secretary legislative powers contrary to Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States, and that Order No. 41 promulgated thereunder is therefore void and unenforceable.

By Section 8c(18) of said Act, Congress delegated to the Secretary of Agriculture authority to fix such prices to producers of milk as he finds in his opinion will reflect the price of feeds, the available supply of feeds, and other market conditions which affect market supply and demand for milk and its products in the marketing area, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and "*thereafter, as the Secretary finds necessary*" on account of changed circumstances, *he shall*, after due notice and opportunity for hearing, "*make any adjustments in such prices.*"

We submit that this power is practically *without limitation* and may be in utter disregard of the express declaration of the policy to Congress as expressed in Section 2 of said Act and without regard to the interests of the handler of the product and of the consumer, and authorizes the Secretary to fix high and exorbitant prices of milk to farmers and compel handlers of milk to pay said high

and exorbitant prices irrespective of the base period mentioned and provided for in said Acts.

By Section 10(c) of said Act, Congress delegated to the Secretary of Agriculture *unlimited authority*, with the approval of the President, to make such regulation with the force and effect of law as may be necessary to carry out the powers vested in him by said title, and provided that any violation of any regulation shall be subject to such penalty, not in exess of $100, as may be provided therein.

This point was not directly passed upon by the Supreme Court in *United States* v. *Rock Royal Co-Operative Inc.*, 307 U. S. 533, 557, 574. Nothing was there said about the unlimited provisions permitting the Secretary after having fixed the prices based upon the evidence produced at the hearing to "thereafter, as the Secretary finds necessary," "make any adjustments in such prices" nor as to the power of the Secretary to enact regulations "with the force and effect of law" as provided by Section 10(c) of the Act.

The language of the dissenting opinion in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 582, is particularly true and applicable to the points raised herein and not passed upon by the Supreme Court.[9]

3. The Sixth Defense.

The Sixth Defense asserts that the Act is invalid as being in conflict with the anti-trust laws of the United

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[9] "A cursory examination of the statute shows clearly enough the design to allow a Secretary to prescribe according to *his own errant will* and then to execute. *This is not governed by law but* by caprice. *Whimseys may displace deliberate action* by chosen representatives and become rules of comment. To us the outcome seems wholly incompatible with the system under which we are supposed to live." (Italics ours.) *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 553, at page 582.

States in that said Order promulgated under said Act creates, fosters and provides for an unlawful monopoly, pool, trust, combination and confederation among producers and handlers of milk who participate therein to regulate and fix the price of milk to farmers; that said order is expressly contrary to the provisions of Sections 1 and 2 of an Act of Congress of July 2nd, 1879, c. 647, 26 Stat. 209 (15 U. S. C. A. Commerce and Trade) and Section 13 (15 U. S. C. A.), and other Acts of Congress, being some of the antitrust laws enacted by Congress; that the enforcement of said Order against this defendant would subject this defendant to criminal prosecution under Federal laws, prohibiting engaging in any such combination or conspiracy for the purpose of fixing prices of commodities, and that said Order No. 41 is therefore illegal and void.

We submit that the proceedings herein are an effort by the Secretary of Agriculture to compel the defendant, *who is engaged purely in intrastate business, and therefore subject to State control,* to participate in this illegal pool or combination which, under the Sherman Anti-Trust Act, would make the defendant a participant and subject to its penalties. While the Act contains provisions exempting marketing agreements, Section 8(b) and Section 3(d) of the Act, such provisions do not apply to orders and, therefore, no such exemption exists with regard to Order No. 41.

Whenever Congress entered the field of price fixing, in the past, it has inserted a provision in the respective Acts exempting persons who participate therein from the provisions of the antitrust laws of the United States. This was true in the case of *National Industrial Recovery Act,* June 16, 1933 (Title 15 U. S. C. A. Sec. 701) the *Bituminous Coal Act,* April 26, 1937, (Title 15, Sec. 832(d), the *Motor Carrier Act,* of 1935, as amended (Title 49, Sec. 313(f)), and others.

We submit that in the absence of some such provisions exempting the producers and handlers of milk from complying with the order, the handlers would nevertheless be subject to Federal prosecution under the antitrust laws and the knowledge and acquiescence of the Federal Government would be no defense thereto.[10]

4. The Seventh Defense.

This defense (R. 93) presents the same question as applied to the State Anti-Trust Laws of Illinois as the one discussed under the Sixth Defense (Point II, 3, supra), and the argument there made is equally applicable. The fact that defendant is engaged entirely in intrastate business and therefore subject to local State control emphasizes the importance of our contention. Congress could have inserted an exemption both as against "State or Federal" antitrust laws, as it did in the *Motor Carrier Act*, but it did not see fit to do so.

The Courts cannot legislate for Congress and supply a provision presumably intentionally omitted by Congress.

5. The Eighth and Ninth Defenses.

These defenses have been argued under Point I, a., b. and c., supra.

6. The Tenth Defense.

This defense (R. 97), alleges that said order is unlawful, discriminatory, unreasonablbe, void and contrary to the Act in that the Secretary arbitrarily designated in Sec. 941.1(1) of said order the cities, towns and villages of Chicago, Evanston, Wilmette, Kenilworth and Glencoe as the "Chicago, Illinois Marketing Area", and arbitrarily

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[10] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. And see footnote 60 appended to this opinion in 84 L. Ed. p. 1170.

omitted from said marketing area other cities, towns and villages marketing milk under the same or similar circumstances and located in the same County and State adjoining the City of Chicago, or in its vicinity, such as Oak Park, Berwyn, Cicero, and others.

It was alleged in the Tenth Defense of defendant's answer (R. 97) that the prices which handlers are compelled to pay producers under Order No. 41 are considerably higher than handlers pay producers for said commodity for sale other than in said marketing area designated by said Order No. 41 in cities, towns and villages in the immediate vicinity of Chicago and said marketing area, such as Oak Park, and others; that handlers of milk engaged in the Chicago, Illinois Marketing Area, who are compelled to comply with Order No. 41, would be discriminated against and be unable to compete with unregulated milk in other adjoining areas under the same or similar conditions, and thereby be deprived of their constitutional rights to engage in their lawful occupation in the State of Illinois except at great loss and irreparable damage.

The merit in defendant's contention was recognized by the Secretary of Agriculture in the order promulgated by the Secretary, effective July 1st, 1940, wherein the marketing area is enlarged to include the village of Oak Park. (See Sec. 941.1(a)(1) of said order, as amended, (R. 122).)

In view of the express provisions contained in Section 8(c)(11)B of said Act, providing that the marketing area in the case of milk and its products shall not be the smallest regional production area or regional marketing area, or both, this question is taken out of the realm of administrative policies over which the Secretary of Agriculture has exclusive jurisdiction, but makes it a question of law for the courts to determine whether or not the order as promulgated by the Secretary actually complies with the requirements of the Acts of Congress, which are mandatory.

It is further urged by cross-respondent that the District Court correctly sustained the motion to strike this defense, *as in any event* there was no prejudicial error in such ruling because the evidence before the Secretary, which was included in defendant's exhibits 1, 2, 3 and 4, was admitted in evidence at the final hearing.

We submit that a careful examination of defendant's exhibits 1 to 4 fails to disclose any competent evidence which warranted such finding on the part of the Secretary.

The fact however is that there was *no hearing* on the *proposed order*, as heretofore shown, *and no opportunity* given to any of the parties to produce evidence to show the harmful effect of such arbitrary designation of territory by the Secretary. The area finally designated by the Secretary as the marketing area was not known at the time of the hearing by the handlers or producers and presumably included competing territory subsequently arbitrarily omitted. The area was arbitrarily and capriciously designated by the Secretary in violation of the Act without a hearing and without competent evidence to support it, and the order is therefore contrary to provisions of the Act and void.

7. The Eleventh Defense.

The Eleventh Defense (R. 97) sets forth that the order is unenforcible, discriminatory, unreasonable and void in that it is contrary to the declaration of conditions and declaration of policy of Congress as set forth in Section 1 and Section 2 of said Act for the reasons therein set forth.

Cross-respondent contends that the Courts are not concerned with the wisdom and economic policy of a regulation imposed under legislative enactment.

Such has been the ruling of the Supreme Court. However, we contend that in view of Sections 1 and 2 of said

Act and the express limitation therein "authorizing no action" under said title contrary to the declared policy of Congress, it is the duty of the Courts to determine the validity of all orders promulgated by the Secretary to ascertain whether such action was in conformity with the declared policy of Congress, and whether such action was, in fact, authorized by law.

The motion to strike admitted the facts in said defense alleged, which facts showed a condition created by said order in violation of the declared policy of Congress. The motion to strike should have been denied.

8. The Twelfth Defense.

This defense alleged (R. 118-141) that during the pendency of said cause, the Secretary had promulgated an Order No. 41, as amended, to regulate the handling of milk, effective July 1st, 1940, in substitution of Order No. 41 herein sought to be enforced. (Compare Order No. 41 (R. 8-22) with the substituted order (R. 120-141).) Plaintiff admitted the issuance of said amended order in its supplemental motion for summary judgment (R. 144, 145).

Order No. 41, as amended, does not preserve existent rights under Order No. 41. The amended order covers the whole subject of Order No. 41, embraces new and different provisions, and plainly shows that it was intended not only as a substitute for the earlier order but to cover the whole subject. The amended Order clearly repealed the former Order.[11]

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[11] *Murphy* v. *Utter*, 186 U. S. 95, 105.
The Paquete Habana, 175 U. S. 677, 685.
United States v. *Tynen*, 11 Wallace, 88, 95, 20 L. Ed. 153, 155.

The case now presents only a moot question.[12]

Respectfully submitted,

ALVIN E. STEIN,
Attorney for Cross-Petitioner.

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[12] *City of Paducah* v. *Paducah Water Co.*, 258 F. 20, 22.
Berry v. *Davis*, 242 U. S. 468.
W. Ames & Co. v. *Wallace*, 81 F. (2d) 414.
Selected Products Corp. v. *Humphreys*, 86 F. (2d) 821 (C. C. A. 7th).

No. 783

In the Supreme Court of the United States

OCTOBER TERM, 1941

WRIGHTWOOD DAIRY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Defendant's answer in this case sets up a number of separate defenses and a counter-claim (R. 84–101). The Government moved to strike many of these defenses (R. 156). By order entered on October 29, 1940, the district court granted this motion with respect to all but the third defense (R. 244). On October 31, 1940, after trial, the court entered a "final judgment" in favor of defendant (R. 247–248). This judgment dismissed the Government's complaint and granted defendant the injunction requested, thus affording defendant all of the relief prayed for in its an-

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swer (R. 100). The Government appealed from the final judgment (R. 250). Defendant cross-appealed from the adverse portions of the order sustaining the motion to strike parts of its answer, and from certain of the findings of fact entered by the district court (R. 256–257). The circuit court of appeals did not find it necessary to pass upon the cross-appeal in view of its disposition of the appeal by the Government, and accordingly ordered the cross-appeal dismissed (R. 274).

The Government would ordinarily consent to the granting of a cross-petition for certiorari in order to bring all of the issues in the case before this Court if the petition for certiorari be granted. In this case, however, there is serious doubt as to whether the order sought to be reviewed on the cross-petition is appealable. Defendant's position is that of a victorious party, some of whose arguments have been rejected by the trial court but others, independently supporting a final judgment in his favor, accepted. Under such circumstances the final judgment in defendant's favor leaves him nothing to appeal from, even though the court has not accepted all of the arguments advanced to support it. We bring this point to the Court's attention, since the Court may not desire to grant certiorari with respect to an unappealable order.

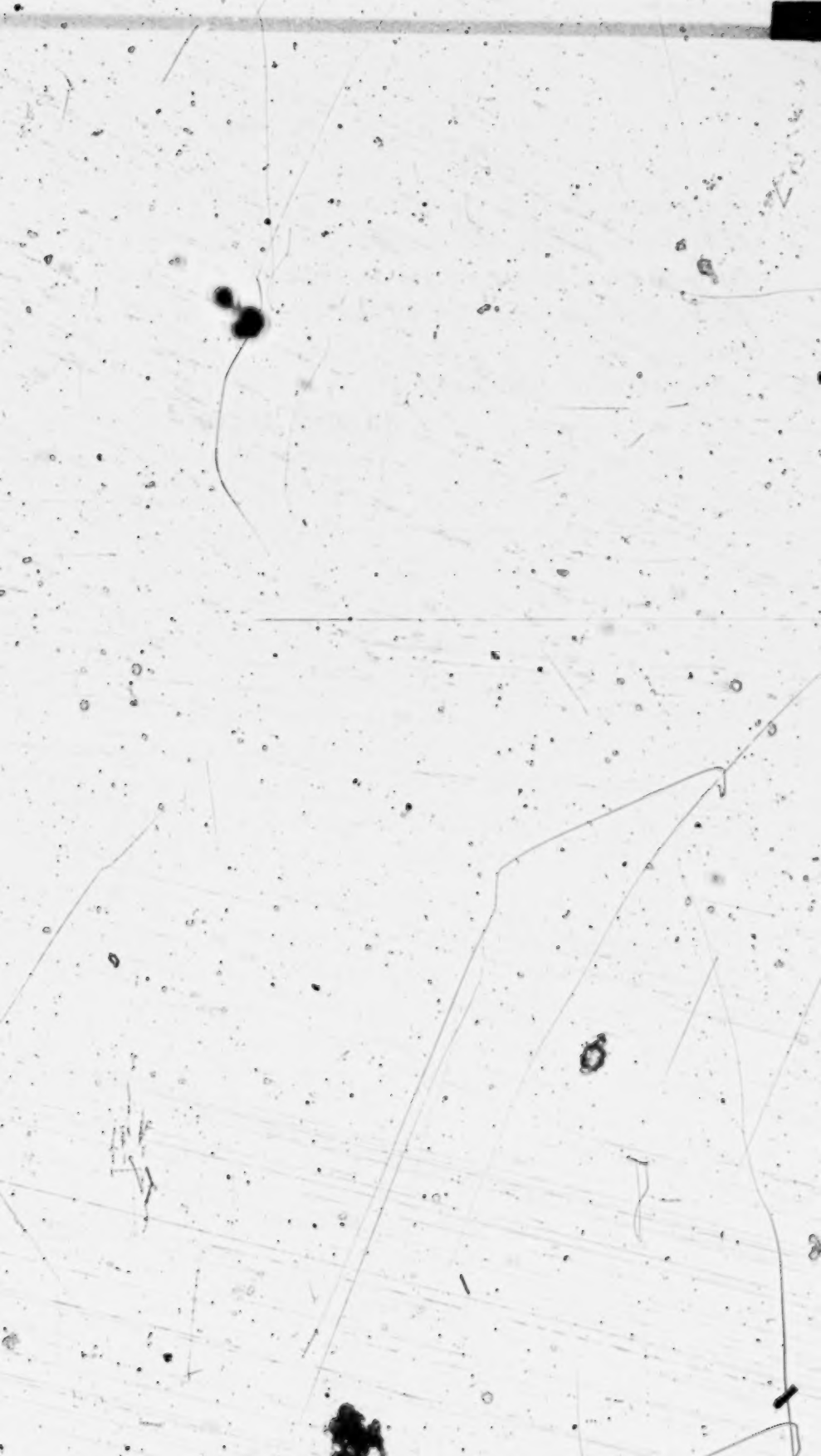
In addition, we suggest that the cross-petition and accompanying briefs themselves disclose that the points which defendant seeks to raise are

neither important nor meritorious to warrant consideration by this Court. Cf. *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE 1941



SUPREME COURT OF THE UNITED STATES.

Nos. 744, 783.—October Term, 1941.

The United States of America, Petitioner, vs. Wrightwood Dairy Company. (744)	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Wrightwood Dairy Company, Petitioner, vs. The United States of America. (783)	

[February 2, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The principal questions for our decision are whether certain price regulation by the Secretary of Agriculture of milk produced and sold intrastate is authorized by the provisions of the Agricultural Marketing Agreement Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 608c, and is a permissible regulation under the commerce clause of the Constitution.

Section 8c of the Act authorizes the Secretary of Agriculture to issue marketing orders fixing minimum prices to be paid to producers of milk and certain other commodities. Paragraph 1 of the section provides that orders of the Secretary "shall regulate in the manner hereinafter in this section provided, only such handling of such agricultural commodity or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof".

The United States sought in the present suit a decree directing respondent to comply with the Secretary's Order No. 41, of August 28, 1939, regulating the handling of milk in the "Chicago, Illinois, marketing area." Respondent is a handler in that area of milk which it purchases from producers in Illinois. The order, which is of the type described in the opinion of this Court in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 551-

555, is by its terms applicable to respondent, and purports to carry out the statutory scheme for regulating the price of milk paid to producers considered in the opinion in that case. By the order the Secretary found that all milk produced for sale in the marketing area "is handled in the current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products . . . ", and directed that it apply to such "handling of milk" in the marketing area "as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce".

The order, as provided by the statute, § 8c(5), classifies milk according to its uses, and establishes a formula for determining the minimum price to be paid to producers for each class of milk. It prescribes the method of determining the value of milk received from producers by each handler during each month. It requires the payment of a uniform unit price to producers, computed by dividing the total value of milk reported by all handlers in the marketing area by the total quantity of such milk, with deductions of certain amounts to provide a cash balance in a "producer-settlement fund". The handler is required to pay producers the uniform price, subject to butterfat and location differentials. But he is also required to pay into the settlement fund, or permitted to withdraw from it, as the case may be, certain amounts, depending on whether the total value of the milk used by him is greater, or less, respectively, than his total payments to producers at the uniform price. The amounts withdrawn from the settlement fund by handlers are required to be used to bring the price received by certain producers up to the uniform price set in the order, where, because of the purpose for which the handler has sold it, the value of their milk is less than the uniform price. Handlers are required to make reports to the Administrator containing information necessary for the execution of the order and to bear the expense of administering it.

Respondent's answer in the District Court sets up that its business is entirely intrastate and that in consequence the statute does not and under the commerce clause can not constitutionally apply to it. The answer also sets up additional grounds, which need not now be considered, for respondent's contention that the order is invalid, and by way of counterclaim prays that the United States and its officers and agents be enjoined from enforcing the order. The court

found that respondent had not complied with the order; that in the course of its business it purchases milk from producers within the State of Illinois, processes the milk and sells it in the state "in competition with the milk of other handlers in the area"; that none of respondent's milk is physically intermingled with that which has crossed state lines; and that prior to the order 60 per cent of the milk sold in the marketing area was produced in Illinois and 40 per cent in neighboring states, and that at the time of the findings "over 60 per cent" was produced in Illinois. The record shows that "approximately 40%" comes from without the state.

The court held that "the order was issued by the Secretary in full compliance with the law. All conditions precedent to the effectiveness of said order have occurred", but that the business of the defendant "was not in the current of interstate . . . . commerce and did not directly burden, obstruct or affect interstate . . . . commerce in milk marketed within the Chicago, Illinois, marketing area." It accordingly decreed that the complaint be dismissed, and granted the injunction prayed by the counterclaim.

The Circuit Court of Appeals affirmed, 123 F. 2d 100, on the sole ground that Congress is without authority under the commerce clause to regulate intrastate transactions in milk which affect interstate commerce through competition only. It recognized that respondent's milk is sold in competition with other milk moving interstate; that the "milk problem is a serious one and apparently for the most effective control requires unified regulations", and that if respondent is not subject to the present regulations "it may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempted solution of the problem by the National Government will fail." But it concluded that there is a hiatus between the constitutional power of state and nation which precludes any solution of the problem by Congressional legislation.

We think there is no such hiatus. Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce, *United States* v. *Rock Royal Cooperative, Inc.*, *supra*, and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appro-

priate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *United States* v. *Ferger*, 250 U. S. 199; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221; *United States* v. *Darby*, 312 U. S. 100, 118-19. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.

Familiar examples are the Congressional power over commodities inextricably commingled, some of which are moving interstate and some intrastate, see *United States* v. *New York Central R. R. Co.*, 272 U. S. 457, 464; the power to regulate safety appliances on railroad cars, whether moving interstate or intrastate, *Southern Ry. Co.* v. *United States*, 222 U. S. 20; the power to control intrastate rates of a common carrier which affect adversely federal regulation of the performance of its functions as an interstate carrier, *Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; the regulation by the Tobacco Inspection Act of tobacco produced intrastate and destined to consumers within the state as well as without, *Currin* v. *Wallace*, 306 U. S. 1; the regulation of both interstate and intrastate marketing of tobacco under the Agricultural Adjustment Act, *Mulford* v. *Smith*, 307 U. S. 38, 47; and see cases collected and discussed in *United States* v. *Darby*, 312 U. S. 100, 118-125.

Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Patten*, 226 U. S. 525; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Local 167* v. *United States*, 291 U. S. 293; *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255. So too the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional

regulation of the intrastate activity. It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power. Cf. *Shreveport Case, supra; Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R. Co., supra; National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 36-43; *United States* v. *Darby, supra*, 122.

As the court below recognized, and as seems not to be disputed, the marketing of intrastate milk which competes with that shipped interstate would tend seriously to break down price regulation of the latter. Under the conditions prevailing in the milk industry, as the record shows, the unregulated sale of the intrastate milk tends to reduce the sales price received by handlers and the amount which they in turn pay to producers. Study of the order which we have summarized makes clear that the unregulated handler selling fluid milk can pay producers substantially less than the minimum price set in the order for milk of that class, and yet pay as much as, or more than, the "uniform price" prescribed by the regulatory scheme for all producers, which is based upon the average price for the several classes of milk combined. Such a handler would have an advantage over others in the sale of the class of milk in which he principally deals, and could force his competitors dealing in interstate milk to surrender the market or seek to reduce prices to producers in order to retain it.

It is no answer to suggest, as does respondent, that the federal power to regulate intrastate transactions is limited to those who are engaged also in interstate commerce. The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce. See *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Stevens Co.* v. *Foster & Kleiser Co., supra.* It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power. *Second Employers' Liability Cases*, 223 U. S. 1, 51. We conclude that the national power to regulate the price of milk moving interstate into the Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and

competition with the interstate milk affects its price structure so as in turn to affect adversely the Congressional regulation.

We turn to the question whether Congress has exercised that authority by § 8c(1). Respondent argues that Congress, in enacting it, did not intend to exercise its full power over commerce, and that read in the light of its legislative history the section does not authorize the regulation of competing intrastate milk. In terms the statute speaks of the handling of products "in the current of interstate commerce" or "which directly burdens, obstructs, or affects, interstate commerce". The argument is that the word "directly" in the statute is restrictive, evidencing an intention to exercise less than the full authority possessed by Congress, and a purpose not to extend that authority to the regulation of local products which affect the interstate commodities and their regulation only by competing with them.

In support of this contention respondent points to the precursor of the present statute, the Agricultural Adjustment Act of 1933, 48 Stat. 31, 35, as amended by 48 Stat. 528, which contained provisions omitted from the present statute, specifically authorizing certain regulation of products "in competition with" those in interstate commerce. Section 8(2) of the 1933 Act, as amended, authorized the Secretary to enter into marketing agreements with those "engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce". And § 8(3) provided for the issuing of licenses to those engaged "in handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof". In the 1935 amendments to the Agricultural Adjustment Act these provisions were replaced by the phraseology which was taken over without change into § 8c(1) of the Agricultural Marketing Agreement Act of 1937, already quoted. Hence it is to the legislative history of the 1935 amendments that we must turn to ascertain the significance of the phrase, "directly affects" interstate commerce, which then appeared in the statute for the first time.

The bills providing for the 1935 amendments, as introduced, eliminated the differences between § 8(2) and § 8(3) of the 1933 Act, as amended, and authorized the Secretary to issue licenses to those "engaged in the handling of any agricultural commodity or

product thereof, or any competing commodity or product thereof, in the current of or in competition with or so as to burden, obstruct, or in any way affect, interstate or foreign commerce". S. R. 1807, H. R. 7713 and 8052, 74th Cong., 1st Sess. In the reports of the House and Senate Committees on Agriculture, it was pointed out that although "the full extent of the Federal power over interstate commerce is intended to be vested in the Secretary", it was "not intended to authorize the licensing of persons handling goods only in intrastate commerce except where such handling burdens, obstructs, or affects interstate commerce." S. Rep. No. 548, p. 6, H. Rep. No. 808, p. 5, H. Rep. No. 952, p. 5, 74th Cong., 1st Sess.

These bills were pending in Congress when *Schechter Corp.* v. *United States*, 295 U. S. 495, was decided on May 27, 1935. In consequence of that decision a new bill, H. R. 8492, was reported out which superseded the pending bills and eventually became the Act of 1935. The new bill, in terms, permitted the Secretary to regulate the handling of products which "directly affects" interstate commerce. As the legislative history demonstrates, this phraseology was deliberately chosen to conform to that adopted in the opinion in the *Schechter* case, as signifying the full reach of the commerce power, and with the avowed purpose of conferring on the Secretary authority over intrastate products to the full extent of that power. See 79 Cong. Rec. 9478 and S. Rep. No. 1011, p. 8, H. Rep. No. 1241, p. 8, 74th Cong., 1st Sess.

In the *Schechter* case the Court was concerned only with the alleged infringements of the "Code of Fair Competition" for the live poultry industry of the New York City metropolitan area, which had been adopted under the provisions of § 3 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 196. The violations of the code charged were that wholesale distributors who had purchased poultry in New York, most of which came from without the state, and who were engaged in slaughtering and reselling to retailers, had failed to maintain for their employees wages and hours prescribed by the code, and had failed to abandon "selective selling" to their customers in New York which the code had prohibited.

The Court's opinion pointed out that the defendants were not charged with injury to interstate commerce or interference with persons engaged in that commerce, and that the acts charged had no

different relation to or effect upon interstate commerce than like acts in any other local business which handle commodities brought into the state. *Schechter Corp.* v. *United States, supra,* 545-6. It characterized their effect upon interstate commerce as "indirect", and distinguished them from those acts and transactions intrastate which; because they "directly affect" interstate commerce, are within the Congressional regulatory power. In explanation of this distinction and as examples of direct effects which are within the commerce power it referred to the "fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce", citing the *Shreveport Case, supra,* and referred to intrastate restraints upon competition injuriously affecting interstate commerce condemned by the Sherman Act, citing *Local 167* v. *United States, supra,* and other cases.

In adopting the change in the new bill, giving to the Secretary the authority to regulate the handling of products "directly affecting" interstate commerce, and in deleting the phrase "in competition with" interstate commerce, the House and Senate Committees on Agriculture, after referring to the *Schechter* case, stated: "This phrase has been omitted from the proposed § 8c(1) of the bill which deals with orders . . . because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders." See S. Rep. No. 1011, p. 9; H. Rep. No. 1241, p. 8, 74th Cong., 1st Sess.

The same interpretation of the amendments was given by the Committee representative charged with explaining them on the floor of the Senate, who declared, 79 Cong. Rec. 11139, "The position of the Committee in respect to these amendments is that intrastate commerce may burden or affect interstate commerce and that consequently this is a constitutional enactment under the decision of the Court in the Shreveport case." The House debates also disclose general recognition that the bill as amended was intended to be a full exercise of the federal power over competing intrastate milk. 79 Cong. Rec. 9479-9480, 9485.

The opinions of some members of the Senate,[1] conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor of the Senate and the House, are not to be taken as per-

[1] 79 Cong. Rec., 11135-6.

suasive of the Congressional purpose. Cf. *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U. S. 290, 318. Moreover, other Senators, not members of the Committee on Agriculture, accepted its views of the extent to which the federal power was to be exerted by the proposed legislation.[2]

We think it clear that Congress, by the provisions of § 8c(1) conferred upon the Secretary authority to regulate the handling of intrastate products which by reason of its competition with the handling of the interstate milk so affects that commerce as substantially to interfere with its regulation by Congress; and that the statute so read is a constitutional exercise of the commerce power. Such was the view expressed in *United States* v. *Rock Royal Cooperative, Inc., supra*, 568. We adhere to that opinion now.

The judgment will be reversed, but as errors assigned below have not been passed on there or argued here, the cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion. The mandate will issue forthwith.

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] 79 Cong. Rec., 11134-9.